IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1051

BESSIE B. GIVHAN,
Petitioner,

v.

WESTERN LINE CONSOLIDATED SCHOOL DISTRICT et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

STEPHEN J. POLLAK
RICHARD M. SHARP
734 Fifteenth Street, N.W.
Washington, D.C. 20005

DAVID RUBIN
1201 Sixteenth Street, N.W.
Washington, D.C. 20036

FRED L. BANKS
318 East Pearl Street
Jackson, Mississippi 39205

Attorneys for Petitioner

Of Counsel:

SHEA & GARDNER
734 Fifteenth Street, N.W.
Washington, D.C. 20005

WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D. C. 20001

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No.

BESSIE B. GIVHAN,
Petitioner,

v.

WESTERN LINE CONSOLIDATED SCHOOL DISTRICT et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner Bessie B. Givhan respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, reversing a judgment of the United States District Court for the Northern District of Mississippi.[1]

---

[1] Respondents are the Western Line Consolidated School District, Mississippi; its Superintendent, Harold N. Adams; its Board of Education; the members of its Board of Education, H. T. Cochran, W. T. Eifling, Chalmers Hobart, Wynn Starnes, Clyde Nichols, and Ivory Walker, Sr.; and James S. Leach, Principal of Glen Allen Attendance Center, a school operated by the respondent school district.

OPINIONS BELOW

The opinion of the court of appeals, dated July 18, 1977, and reprinted as Appendix A, *infra*, is reported at 555 F.2d 1309. The district court's unpublished Memorandum of Decision, dated July 2, 1975, is attached as Appendix B, *infra*.

JURISDICTION

The judgment of the court of appeals was entered on July 18, 1977. Appendix C, *infra*. A timely petition for rehearing and suggestion for rehearing en banc was denied on October 27, 1977.[2] Appendix D, *infra*. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1) (1970).

QUESTION PRESENTED

Whether a teacher's statements criticizing practices in her school which she believes to be racially discriminatory are protected by the First Amendment where those statements are communicated to her principal rather than presented in a public forum.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Amendment I:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

U.S. Constitution, Amendment XIV:

[2] Petitioner's time for filing a petition for rehearing and suggestion for rehearing en banc was extended to and including August 15, 1977.

> ". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Revised Statutes, § 1979, 42 U.S.C. § 1983 (1970):

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

STATEMENT OF THE CASE

This case arises from the decision by school officials in a Mississippi school district, made during the process of school desegregation, to terminate the employment of a concededly competent black teacher, petitioner Bessie B. Givhan, because she urged her principal to modify practices in her school which she believed to be racially discriminatory. App. 9, 35-36. Petitioner sought and was granted leave to intervene in a pending desegregation case against the school district, *Ayers* v. *Western Line Consolidated School Dist. No. 1 et al.*, No. GC-66-1-S (N.D. Miss.). Her complaint in intervention alleged, *inter alia*, that the termination of her employment violated the First and Fourteenth Amendments to the Constitution and R.S. § 1979, 42 U.S.C. § 1983. The district court's jurisdiction rested on 28 U.S.C. §§ 1331 and 1343(3).

The facts relevant to this petition are drawn exclusively from the court of appeals' opinion which accepted the district court's findings of fact. App. 11, 12. Both courts found that

> "the primary reason for the school district's failure to renew Givhan's contract was her criticism of the policies and practices of the school district, especially the school to which she was assigned to teach." App. 8-9, 35.

Specifically, Mrs. Givhan had requested her principal in conversation and in writing to assign black people to the ticket taking jobs in the cafeteria, to integrate better the administrative staff of the school, and to use black "Neighborhood Youth Corps Workers" in semi-clerical positions instead of only janitorial work. App. 6-7, 12 & n. 12, 33-34. The court of appeals noted that "[t]hese requests all reflect Givhan's concern as to impressions on black students of the respective roles of whites and blacks in the school environment." App. 6. The principal, however, considered these requests to be "constant," "petty and unreasonable demands" that manifested her "arrogance and antagonistic and hostile relationship." App. 7, 9, 33, 35. Both courts below expressly rejected the principal's characterization of Mrs. Givhan's expressions, finding that these requests were not "constant"—the principal being able to identify only two occasions when requests were made; nor were they "petty" or "unreasonable" since they "involved employment policies and practices at Glen Allen school which Givhan conceived to be racially discriminatory in purpose or effect." App. 9, 35. Thus, the district court found and the court of appeals confirmed that

> "the school district's motivation in failing to renew Givhan's contract was almost entirely a desire to rid themselves of a vocal critic of the district's policies and practices which were capable of interpretation as embodying racial discrimination." App. 9, 35-36.

Relying on *Pickering* v. *Board of Education*, 391 U.S. 563 (1968), and *Perry* v. *Sindermann*, 408 U.S. 593

(1972), the district court held that the school district's decision to terminate Mrs. Givhan's employment violated her First Amendment rights. App. 36. It entered judgment granting her reinstatement and backpay. App. 2, n. 3. The court of appeals reversed the district court's ruling and remanded for further proceedings on a separate and independent claim.[3] App. 20.

The court of appeals held that this Court's decision in *Pickering* does not provide the standard by which Mrs. Givhan's First Amendment claim is to be determined. It said that *Pickering* would have required a balancing " 'between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State as employer, in promoting the efficiency of the public services it performs through its employees.' " App. 12.[4] But balancing was improper here, the court ruled, because neither a teacher nor a

---

[3] The unresolved claim is that the nonrenewal of Mrs. Givhan's contract was part of an overall reduction in force incident to desegregation. The *Singleton* decree requires school districts in the Fifth Circuit to apply objective employment criteria if they are implementing an overall reduction in force during desegregation. *Singleton* v. *Jackson Municipal Separate School District*, 419 F.2d 1211 (5th Cir. 1969) (en banc). At trial, the parties stipulated to facts showing that there was no overall reduction in force. In a post-trial motion, Mrs. Givhan requested the district court to relieve her of that stipulation. The district court did not pass upon this request. It expressed a "disinclination to allow its decision on the merits to turn upon the tenuous distinction between" an increase in staff which defendants urged amounted to 16, and a reduction in staff which plaintiff urged amounted to two. App. 32. See App. 30, 31.

[4] The court of appeals noted that the school district "did not expressly defend on the ground that Givhan's expression substantially interfered with her work or with her relationship" with the principal. App. 13 n. 13. The court also noted that "[t]he district court's finding that Givhan's complaints were neither constant nor unreasonable might be taken as a finding that there was no substantial interference with her work." *Id.*

citizen has a First Amendment interest in "making complaints to the principal." App. 13, 19.[5]

In support of its ruling, the Fifth Circuit quoted liberally from decisions of this Court which hold that various types of public expression by school teachers are protected by the First Amendment. App. 14-16, citing, *e.g.*, *Pickering* v. *Board of Education*, 391 U.S. 563 (1968); *Perry* v. *Sindermann*, 408 U.S. 593 (1972); *Mt. Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274 (1977). The court of appeals said that these cases "illustrate the importance of protecting the right of public expression" (App. 15) and contain the "strong implication" that "private expression by a public employee is not constitutionally protected." App. 16.

The Fifth Circuit also reasoned that Mrs. Givhan's communication with her principal was outside the coverage of the First Amendment because "[n]either a teacher nor a citizen has a constitutional right to single out a public employee to serve as the audience for his or her privately expressed views, at least in the absence of evidence that the public employee was given that task by law, custom, or school board decision." App. 19.[6] "If we held Givhan's expressions constitutionally protected," the court said, "we would in effect force school principals

[5] The court of appeals also concluded that if the First Amendment protected Mrs. Givhan's expression of views to a public official, then she had established a violation of her constitutional rights within the framework of this Court's decision in *Mt. Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274 (1977). The court said that the principal and the board "were motivated primarily by Givhan's 'demands' in deciding not to rehire her" and that the school district and its officers "do not, and seriously cannot, argue that the same decision would have been made without regard to the 'demands.'" App. 11.

[6] The court of appeals cited (App. 18) *Rowan* v. *United States Post Office Department*, 397 U.S. 728, 737 (1970), and Justice Douglas' concurring opinion in *Lehman* v. *City of Shaker Heights*, 418 U.S. 298, 305, 307 (1974).

to be ombudsmen, for damnable as well as laudable expressions." App. 20.[7]

The court of appeals was not altogether comfortable with its decision. It acknowledged that this case "could be" one of those "hard cases [that] make bad law" (App. 19); and one member of the court, Roney, J., specially concurred because there are "probably many occasions when First Amendment constitutional protection will reach private expression by a public employee, but I agree that the district court erred in casting this case in the First Amendment terms." App. 26.

REASONS FOR GRANTING THE WRIT

I

The Fifth Circuit has decided an important question of constitutional law which has not been, but should be, settled by this Court.

Public employees like Mrs. Givhan, by reason of training and experience, are often better informed than other citizens about deficiencies in the programs of the agency in which they serve. See *Pickering*, *supra*, 391 U.S. at 572. Many factors, however, may cause such an employee to hesitate before publicly broadcasting his concerns. Among these are fear of reprisal, a delicate sense of professional etiquette, and personal reticence. Additionally, a public employee may feel with good reason that he can be more effective by bringing his concerns, at least initially, directly to his superiors. "Whistle blowers" make an important contribution to good government, but the public is also well served by a public employee who con-

[7] The record does not contain any evidence showing that the principal or any other official advised Mrs. Givhan to refrain from discussing her views with her principal. Mrs. Givhan testified that she believed that she was supposed to go through the chain of command and that the principal was the next link in the chain leading to the superintendent and then the board. Trial transcript, p. 134.

cludes in light of the circumstances that beneficial change is more likely to result from quiet dialogue through channels than from publicity which may embarrass agency officials or stiffen their opposition to suggested reforms.[8]

The court of appeals has fashioned a rule of constitutional law that would require a teacher or other public employee to risk his livelihood whenever he makes a reasonable suggestion to his superiors concerning important agency policies or practices. The court reasoned that the principal should not be "single[d] out" as the audience for a teacher's views unless the principal has been charged with that function. It observed, "if we held Givhan's expressions constitutionally protected, we would in effect force school principals to be ombudsmen for damnable, as well as laudable expressions." App. 20. The court, however, gave no apparent consideration to whether these divergent interests could be accommodated through regulations governing the time, place and manner in which public employees and other citizens may present concerns to appropriate public officials, *Grayned* v. *City of Rockford*, 408 U.S. 104, 115-17 (1972); *Police Department of Chicago* v. *Mosley*, 408 U.S. 92, 98 (1972), and whether such accommodation is constitutionally required. In short, the decision below excises from First Amendment protection a broad category of speech—including speech of considerable public importance—even though the ends sought to be served can be fulfilled by narrowly drawn regulations which do not so sweepingly encroach

[8] The district court found that in the wake of desegregation the atmosphere in the Western Line Consolidated School District was one of "student and teacher demonstrations and other unpleasant manifestations of general discontent and unrest among the black community as to the course of the desegregation in" the school district. App. 35. Mrs. Givhan reasonably could have concluded that in those circumstances a direct communication to her principal was best calculated to achieve the changes she believed were needed and least likely to fan the flames of racial strife.

upon First Amendment interests.[9] Cf. *Shelton* v. *Tucker*, 364 U.S. 479, 488 (1960); *James* v. *Board of Education of Central Dist. No. 1*, 461 F.2d 566, 574 (2d Cir. 1972).

Significantly, the theory of the court of appeals in excluding direct communication with public officials from the protections of the First Amendment expressly encompasses speech by private citizens as well as public employees. The court of appeals did not base its rejection of Mrs. Givhan's claims on the conclusion that the government's interests in regulating her speech differed significantly from its interests in regulating similar speech by citizens in general. Rather it concluded that

> "[n]either a teacher *nor* a citizen has a constitutional right to single out a public employee to serve as the audience for his or her privately expressed views, at least in the absence of evidence that the public employee was given that task by law, custom, or school Board decision." App. 19 (emphasis added).

Thus, under the reasoning of the court of appeals, the First Amendment would not prevent a municipal government from revoking a citizen's library privileges or trash collection services because he complained to an official

[9] The Fifth Circuit's decision draws upon *Rowan* v. *United States Post Office Department*, 397 U.S. 728, 737 (1970), and a concurring opinion of Justice Douglas in *Lehman* v. *Shaker Heights*, 418 U.S. 298, 305, 307 (1974). These opinions are inapposite since they balance two independent constitutional rights—the right of free speech and the right of privacy. The right of privacy is not involved here since the communications were addressed to a public official during working hours and concerned matters of public importance within the purview of the official's responsibilities. This Court has at least twice cautioned against broadly applying *Rowan* in other contexts:

> "The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is . . . dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner." *Erznoznik* v. *Jacksonville*, 422 U.S. 205, 209-210 (1975), quoting, *Cohen* v. *California*, 403 U.S. 15, 21 (1971).

who the citizen reasonably concluded was the appropriate recipient.

This Court has regarded as important and worthy of review, decisions placing a class or genre of communication outside the First Amendment. See *Beauharnais* v. *Illinois*, 343 U.S. 250, 252, 266 (1952) (malicious defamation); *Roth* v. *United States*, 354 U.S. 476, 480-81 (1957) (obscenity). *Cf. Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 571, 572 (1942) ("fighting words"). The court of appeals' conclusion that a communication by a public employee or citizen with a public official reasonably perceived to be an appropriate recipient is beyond the reach of the First Amendment similarly warrants review by this Court.

II

Review by this Court is also waranted because the Fifth Circuit's decision conflicts with decisions of other courts of appeals which, relying on *Pickering*, hold that a public employee's statements to his superiors are protected by the First Amendment unless, on the facts of the case, "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees" outweighs the First Amendment interest of the employee. *Pickering* v. *Board of Education*, 391 U.S. 563, 568 (1968).

The D.C. Circuit has recognized that First Amendment interests are at stake when public employees address communications to superior officials. In *Ring* v. *Schlesinger*, 502 F.2d 479 (D.C. Cir. 1974), a teacher employed at a naval facility sent a memorandum and a personal statement to four persons officially responsible for matters at the school. *Id.* at 481, 489. The memorandum charged that the principal was incompetent and had disregarded professional ethics. The court of appeals analyzed the constitutionality of the teacher's discharge in accordance

with *Pickering* and remanded for further proceedings because the district court had accepted uncritically the conclusion of the commanding officer that the memorandum had impaired the efficiency of the service. The circuit court concluded that "[t]he balancing here of First Amendment freedoms against an asserted governmental interest requires the judgment of the District Court." *Id.* at 489-90.

The Third Circuit in *Roseman* v. *Indiana University of Pennsylvania*, 520 F.2d 1364 (3d Cir. 1975), recognized that First Amendment interests were implicated by a professor's "private" complaints to her dean. Applying *Pickering*, the court determined that because the statements were neither made in a public forum nor involved matters of public concern, the First Amendment interest in their protection was "correspondingly reduced." The court stated, however, that "entirely different considerations would come into play" if the statements "had been on issues of public interest." *Id.* at 1368 n. 11.

The Fourth Circuit is in accord. In *Jannetta* v. *Cole*, 493 F.2d 1334 (4th Cir. 1974), Jannetta, a fireman, served on the City Manager a petition signed by 24 firemen protesting the promotion of black employees. For this, Jannetta was suspended and then terminated. The Fourth Circuit rejected the public employer's contention that in order to be protected by the First Amendment, a public employee's communication must be "directed to the public." *Id.* at 1337 n. 4.[10]

---

[10] In *Jannetta*, the court recognized that a public employee has a First Amendment right "to communicate a grievance to his superiors." *Jannetta* v. *Cole*, *supra*, 493 F.2d at 1337 n. 5. As this statement suggests, such a communication implicates not only the "speech" but also the "petition" clause of the First Amendment. Even before *Pickering*, the Court of Claims had held that a federal employee's letter to the head of his department protesting and criti-

The Tenth Circuit, sitting en banc in *Smith* v. *Losee*, 485 F.2d 334 (10th Cir. 1973), acknowledged that the teacher dismissal case before it differed from *Pickering* in that Professor Smith's statements "were not made to the public as in *Pickering* but were made at meetings at which only Dixie College administrators and faculty were present." *Id.* at 338. The court of appeals concluded nonetheless that Professor Smith's statements were protected by the First Amendment. *Id.* at 340. See also *Hostrop* v. *Board of Junior College District No. 515, Ill.*, 471 F.2d 488, 493 n. 13 (7th Cir. 1972).[11]

In short, the decision below presents not only an important issue of constitutional law but conflicts with rulings of other courts of appeals that communications by public employees to their superiors implicate First Amendment interests.

---

cizing the conduct of the employee's superiors was protected by the First Amendment freedom to petition for redress of grievances. *Swaaley* v. *United States*, 376 F.2d 857, 863 (Ct. Cl. 1967). See also *Burkett* v. *United States*, 402 F.2d 1002, 1003-04, 1007-08 (Ct. Cl. 1968); *Jackson* v. *United States*, 428 F.2d 844, 846, 848 (Ct. Cl. 1970).

[11] For district court opinions that reject the Fifth Circuit's rule, see *Johnson* v. *Butler*, 433 F. Supp. 531, 535 (W.D. Va. 1977) (First Amendment "not restricted to public statements" but extends "to protect private conversations by public employees"); *Phillips* v. *Puryear*, 403 F. Supp. 80, 87-88 (W.D. Va. 1975) (statements made to the department chairman and telephone conversations with hostile colleague are protected); *Downs* v. *Conway School District*, 328 F. Supp. 338, 346 (E.D. Ark. 1971) (teacher's private complaint to the principal that open incinerator near classroom constitutes health and safety hazard for children is protected).

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit should be granted and the judgment of that court reviewed on the merits.

Respectfully submitted,

STEPHEN J. POLLAK
RICHARD M. SHARP
734 Fifteenth Street, N.W.
Washington, D.C. 20005

DAVID RUBIN
1201 Sixteenth Street, N.W.
Washington, D.C. 20036

FRED L. BANKS
318 East Pearl Street
Jackson, Mississippi 39205

Attorneys for Petitioner

Of Counsel:

SHEA & GARDNER
734 Fifteenth Street, N.W.
Washington, D.C. 20005

Appendices

APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 75-3485

HENRY B. AYERS et al.,
Plaintiffs,

v.

WESTERN LINE CONSOLIDATED SCHOOL DISTRICT, et al.,
Defendants-Appellants,

v.

MS. BESSIE B. GIVHAN, et al.,
Plaintiffs-Intervenors Appellees.

July 18, 1977

Before GEWIN, RONEY and HILL, Circuit Judges.

GEWIN, Circuit Judge.

Mary Butler, Bessie Givhan, and Dolleye Hodges filed suit in district court on their own behalf and on behalf of three classes of black teachers and employees who were discharged or not rehired by the Board of Education of the Western Line Consolidated School District ("school district"), allegedly in violation of the First and Fourteenth Amendments and in violation of the district court order issued pursuant to *Singleton* v. *Jackson Municiple Separate School District*, 419 F.2d 1211 (5th Cir. 1969) (en banc), *rev'd and remanded sub nom. Carter* v. *West Feliciana Parish School Board*, 396 U.S. 290, 90 S.Ct. 608, 24 L.Ed.2d 477 (1970), *on remand*, 5 Cir., 425 F.2d 1211. The district court dismissed the action without prejudice and granted leave to intervene in

the instant school desegregation case. After the court granted the defendants'[1] motion to strike the class allegations[2] and dismiss Ms. Butler's action with prejudice on her own motion, the case proceeded to a two-day bench trial. The court concluded that the school district failed to rehire Givhan because of her First Amendment expressions and failed to rehire Hodges in violation of the *Singleton* order, and it ordered their reinstatement. Defendants appeal under 28 U.S.C. § 1292(a)(1).[3] We reverse and remand.

The school district is a rural district encompassing most of Washington County and some of Issaquena County, Mississippi. Prior to desegregation proceedings in the district court it operated three black schools (O'Bannon, Avon, and Moore) and two white schools (Riverside and Glen Allan). Pursuant to *Singleton*, accelerated by *West Feliciana Parish School Board, supra*, the district court on January 12 and January 21, 1970, ordered the operation of the school district on a unitary basis after February 9, 1970.[4] Accordingly, the district

---

[1] In addition to the school district itself, the school board members, the district superintendent, and principal James Leach were named as defendants.

[2] 61 F.R.D. 414, 416 (N.D.Miss.1973).

[3] The court also ordered the parties to confer about appellees' claims for back pay and attorneys' fees. After staying its reinstatement order pending appeal, the court entered a final judgment fixing the amount of back pay and attorneys' fees. 404 F.Supp. 1225 (N.D. Miss.1975).

[4] Those orders included, *inter alia*, the following *Singleton* provisions:

(a) Effective not later than February 1, 1970, the principals, teachers, teacher-aides and other staff who work directly with children at a school shall be so assigned that in no case will the racial composition of a staff indicate that a school is intended for Negro students or white students. For the remainder of the 1969-70 school year the district shall assign the staff described above so that the ratio of Negro to white teachers in each school, and the ratio of

was reconstituted into one high school and two elementary schools for the second semester of the 1969-70 school year. In the summer of 1970 the desegregation plan was amended to establish attendance centers with grades 1-12 at O'Bannon, Riverside, and Glen Allan. Blacks constituted a majority of the faculty and student body in the district both before and after desegregation. It is undisputed that the school district failed to develop nonracial objective criteria to be used in selecting staff members for dismissal or demotion, as required by the district court's *Singleton* order in note 4 *supra*.

---

other staff in each, are substantially the same as each such ratio is to the teachers and other staff, respectively, in the entire school system.

The school district shall, to the extent necessary to carry out this desegregation plan, direct members of its staff as a condition of continued employment to accept new assignments.

(b) Staff members who work directly with children, and professional staff who work on the administrative level will be hired, assigned, promoted, paid, demoted, dismissed, and otherwise treated without regard to race, color, or national origin.

(c) If there is to be a reduction in the number of principals, teachers, teacher-aides, or other professional staff employed by the school district which will result in a dismissal or demotion or [sic] any such staff members, the staff member to be dismissed or demoted must be selected on the basis of objective and reasonable nondiscriminatory standards from among all the staff of the school district. In addition if there is any such dismissal or demotion, no staff vacancy may be filled through recruitment of a person of a race, color, or national origin different from that of the individual dismissed or demoted, until each displaced staff member who is qualified has had an opportunity to fill the vacancy and has failed to accept an offer to do so.

Prior to such a reduction, the school board will develop or require the development of non-racial objective criteria to be used in selecting the staff member who is to be dismissed or demoted. These criteria shall be available for public inspection and shall be retained by the school district. The school district also shall record and preserve the evaluation of staff members under the criteria. Such evaluation shall be made available upon request to the dismissed or demoted employee.

Appellee Givhan taught English in the junior high grades at O'Bannon from 1963 until her transfer to Riverside for the second semester of 1969-70. She then taught junior high English at Glen Allan during the 1970-71 school year. Appellee Hodges taught fifth grade for nearly four years at Glen Allan until January, 1970. At that time she became certified as a guidance counselor under an "eighteen hour permit," and thereafter she held the position of guidance counselor at Glen Allan. Having received her Master of Education degree in the spring of 1971, Hodges held a "double A" certificate as a guidance counselor during the 1971-72 school year. Beyond these facts, the cases of Givhan and Hodges are best treated separately.

I. Givhan

Givhan was not rehired by the school district for the 1971-72 school year.[5] By letter dated May 1, 1971, Glen Allan principal James Leach notified Superintendent C. L. Morris that Ms. Givhan was not being recommended for re-employment, stating in part:

> Ms. Givhan is a competent teacher, however, on many occasions she has taken an insulting and hostile attitude towards me and other administrators. She hampers my job greatly by making petty and unreasonable demands. She is overly critical for a reasonable working relationship to exist between us. She also refused to give achievement tests to her homeroom students.[6]

---

[5] The teacher who replaced Givhan was black.

[6] Superintendent Morris gave his reasons for not rehiring Givhan in a letter to her dated July 23, 1971:

> (1) a flat refusal to administer standardized National tests to the pupils in your charge; (2) an announced intention not to cooperate with the administration of the Glen Allan Attendance Center; (3) and an antagonistic and hostile attitude to the administration of the Glen Allan Attendance Center demonstrated throughout the school year.

Leach testified at trial as to the bases for his recommendation. Leach taught in the district for three years before becoming principal of Glen Allan on October 6, 1970. That school was without a principal for the first several weeks of the 1970-71 school year, and when Leach took the position the school's problems included racial hostility, lack of discipline among the students, and lack of cooperation among the teachers. Shortly after his arrival as principal, Leach solicited greater cooperation at a teachers' meeting. Givhan implied at the meeting that she did not intend to cooperate very much, and Leach later held a private conference with her. Leach testified that at the conference Givhan told him that "she didn't like Western Line District. She didn't like Morris, who was the Superintendent, or anything connected with the system." Givhan denied making these statements.

Leach and Givhan had several other encounters during the 1970-71 school year. Leach sent out a memorandum to all teachers reminding them of "six-weeks' tests" to be given on the Thursday and Friday before report cards were to be issued on the following Wednesday. Givhan apparently thought the memorandum was insufficient advance warning; while students were changing classes she discussed (or perhaps argued) with Leach about the inadequate notice and whether she was to give a "pop test." Leach interpreted this challenge to him in front of students as reflecting her antagonism. Givhan in effect admitted the incident, but explained that her concern for timely notice was generated by the memorandum's subject relating to the more comprehensive semester, not six-weeks', tests.

Another incident involved administration of a standardized achievement test. According to Leach, Givhan announced at a faculty meeting that she would not give the test, as she thought it was part of Ms. Hodges' job.

Leach was later twice informed by Hodges that Givhan still refused to give the test, and he testified that Hodges administered the test. Givhan testified that she may have expressed an intent not to give the test and that she told Leach it was a duty of the guidance counselor. She further testified that on the morning of the test she told Leach she would administer it and that she in fact did so. The latter testimony was corroborated by Hodges and Arcell Jacobs, another Glen Allan teacher at the time.

Finally, there was substantial testimony about "demands" made upon Leach by Givhan.[7] Relatively early in Leach's tenure as principal Givhan gave him a list or lists of what he termed "demands" and she termed "requests." These requests all reflect Givhan's concern as to the impressions on black students of the respective roles of whites and blacks in the school environment. She "requested," among other things: (1) that black people be placed in the cafeteria to take up tickets, jobs Givhan considered "choice"; (2) that the administrative staff be better integrated;[8] and (3) that black Neighborhood

[7] Appellants also sought to establish these other bases for the decision not to rehire: (1) that Givhan "downgraded" the papers of white students; (2) that she was one of a number of teachers who walked out of a meeting about desegregation in the fall of 1969 and attempted to disrupt it by blowing automobile horns outside the gymnasium; (3) that the school district had received a threat by Givhan and other teachers not to return to work when schools reopened on a unitary basis in February, 1970; and (4) that Givhan had protected a student during a weapons shakedown at Riverside in March, 1970, by concealing a student's knife until completion of a search. The evidence on the first three of these points was inconclusive and the district judge did not clearly err in rejecting or ignoring it. Givhan admitted the fourth incident, but the district judge properly rejected that as a justification for her not being rehired, as there was no evidence that Leach relied on it in making his recommendation.

[8] Apparently all of the Glen Allan administrative and office personnel were white except for Ms. Hodges, the guidance counselor, Givhan's husband, who became assistant principal around Thanksgiving, 1970, and a Mr. Jackson. Ms. Givhan did not consider the roles of Hodges, Mr. Givhan, and Mr. Jackson very significant in the overall context of Glen Allan's administration. It should be noted that Mr. Givhan was rehired as assistant principal after Leach's recommendation not to rehire Ms. Givhan.

Youth Corps ("NYC") workers be assigned semi-clerical office tasks instead of only janitorial-type work.

Leach felt that these requests were unreasonable and that they therefore manifested, along with the other incidents noted above, Givhan's antagonistic and hostile attitude toward the administration at Glen Allan and the District. According to Leach, the lunchroom ticket-takers were assigned by the district's overall cafeteria supervisor (a white) at the request of the Glen Allan lunchroom manager (a black). Thus, Leach apparently thought that the assignment of lunchroom personnel was not within his power.[9] Givhan's NYC complaint arose from her concern about the impression on black children of a virtually all-white office staff and discrimination she sensed in the assignment of NYC workers. As she explained it, "when I was at Riverside, when we had white NYC workers and black, and whites worked in the office and the blacks washed the windows . . . I was pointing out to Mr. Leach the discrepancies there in the duties." Leach testified that he was ignorant about assignment of NYC workers at other schools, but thought Givhan's request unreasonable because there was no discrimination in his assignments, as the Glen Allan NYC workers were all black, and because NYC workers there were not qualified to do office work and in fact were hired to do janitorial work.

In sum, Leach testified that he recommended not rehiring Givhan because of her "arrogance and antagonistic and hostile relationship," manifested in the incidents described above, particularly her "unreasonable demands."

[9] Givhan's complaint apparently was triggered by the replacement of two black teachers' aides with a white student as ticket-taker. Givhan admitted that the lunchroom manager was black, but was unaware who had authority to assign lunchroom personnel.

Under Mississippi law in effect when the decision was made not to rehire Givhan, teachers had no tenure and teachers had no right to be tendered another contract. Miss.Code Ann. § 37-9-17 (1972); *Henry* v. *Coahoma County Board of Education*, 246 F.Supp. 517, 521 (N.D. Miss.1963), *aff'd*, 353 F.2d 648, 650 (5th Cir. 1965), *cert. denied*, 384 U.S. 962, 86 S.Ct. 1586, 16 L.Ed.2d 674 (1966). Accordingly, as stated by Judge Roney in *Megill* v. *Board of Regents*, 541 F.2d 1073, 1077 (5th Cir. 1976), the school district was entitled not to rehire Givhan for any reason, as long as the decision did not implicate a constitutional right. *Thompson* v. *Madison County Board of Education*, 476 F.2d 676, 679 (5th Cir. 1973). Further, because Givhan had no property interest in continued employment into the 1971-72 school year, she had no due process right to a hearing.[10] *Robinson* v. *Jefferson County Board of Education*, 485 F.2d 1381-82 (5th Cir. 1973), *cert. denied*, 419 U.S. 862, 95 S.Ct. 115, 42 L.Ed.2d 97 (1974).

As a consequence, appellee does not assert a procedural due process claim, but rather claims of discriminatory treatment, violation of the court's *Singleton* order, and violation of her right to freedom of speech. The district court ignored the first ground and avoided the second. This avoidance was due to "the court's disinclination to allow its decision on the merits to turn upon the tenuous distinction between the modest expansion of Western Line's teacher staff as defendants maintain was the case, or the very slight reduction for which plaintiffs argue." The district court's principal finding as to Givhan is as follows:

> [T]he primary reason for the school district's failure to renew Givhan's contract was her criticism of the

[10] There was testimony, however, that the District Board of Education ordinarily granted requests for a hearing by teachers not rehired. Givhan made no such request, and no hearing was held.

> policies and practices of the school district, especially the school to which she was assigned to teach. In Leach's words, Givhan was not rehired because she was constantly "making petty and unreasonable demands." The court finds that Givhan's "demands" were not constant; Leach being able to testify specifically as to but two occasions. The court finds that those of Givhan's "demands" as were specifically brought to the court's attention were neither "petty" nor "unreasonable", insomuch as all the complaints in question involved employment policies and practices at Glen Allan school which Givhan conceived to be racially discriminatory in purpose or effect.
>
> . . . [T]he school district's motivation in failing to renew Givhan's contract was almost entirely a desire to rid themselves of a vocal critic of the district's policies and practices which were capable of interpretation as embodying racial discrimination. The court conceives this to be a violation of Givhan's rights under the First Amendment to the Constitution of the United States. *Perry* v. *Sindermann*, 408 U.S. 593, 33 L.Ed.2d 570, 92 S.Ct. 2694 (1972); *Pickering* v. *Board of Education*, 391 U.S. 563, 20 L.Ed.2d 811, 88 S.Ct. 1731 (1968).

The proper framework for our analysis was established by the Supreme Court in *Mt. Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977). According to *Doyle*, a plaintiff in a case such as this has the initial burden to show (1) that his conduct was constitutionally protected, and (2) that this conduct was a "substantial factor" or a "motivating factor" in the school board's decision. *Id.* at 287, 97 S.Ct. at 576, 50 L.Ed.2d at 484. If the plaintiff meets that burden, the board can avoid liability only through proof by a preponderance of the evidence that it would have reached the same decision without regard to the protected

conduct. *Id.* Although not made in terms of *Doyle*, appellants' argument seems to touch all three bases. Thus, they argue that Givhan's expressions were not constitutionally protected, that her expressions were not a motivating factor in the school board's or Leach's decision, and that the school district had ample reason not to rehire her anyway.

As to the district court's findings of fact which conform to the *Doyle* framework, this court cannot reject them unless they are clearly erroneous. Federal Rule of Civil Procedure 52(a). As to legal conclusions reached by the district court, we are not bound by the "clearly erroneous" rule and we can make independent determinations. *United States* v. *Mississippi Valley Generating Co.*, 364 U.S. 520, 526, 81 S.Ct. 294, 297, 5 L.Ed.2d 268, 275 (1961). Often this distinction is termed one of questions of fact versus questions of law or versus mixed questions of law and fact. *See generally* 9 C. Wright & A. Miller, Federal Practice & Procedure § 2588 (1971). This court sometimes has termed the distinction one between questions of subsidiary fact and questions of ultimate fact, best described by Judge Bell in *Causey* v. *Ford Motor Company*, 516 F.2d 416, 420-21 (5th Cir. 1975).[11]

---

[11] There exists, however, a significant distinction for the purpose of applying the clearly erroneous test between findings of subsidiary fact and findings of ultimate fact. *See Galena Oaks Corp.* v. *Scofield*, 5 Cir. 1954, 218 F.2d 217, 219-20. Finding a subsidiary fact involves the determination of an evidentiary or primary fact; finding an ultimate fact, on the other hand, "may involve the very basis on which judgment of fallible evidence is to be made." *Baumgartner* v. *United States*, 1944, 322 U.S. 665, 671, 64 S.Ct. 1240, 1244, 88 L.Ed. 1525, 1529. Thus, for example, a finding of infringement of a patent is a finding of ultimate fact [citation omitted]; as is a finding that a gain should be treated as capital rather than ordinary for income tax purposes [citation omitted]. With respect to ultimate findings of fact, furthermore, we noted in *Industrial Instrument Corp.* v. *Foxboro Co.* [5 Cir.], *supra*, 307 F.2d [783] at 786 n. 2:

> We may reverse free of the clearly erroneous rule where . . . the issue revolves around an ultimate fact as distinguished from subsidiary fact questions . . . .
>
> * * * *
>
> Although discrimination *vel non* is essentially a question of fact it is, at the same time, the ultimate issue for resolution in this case . . . . As such, a finding of discrimination is a finding of ultimate fact.

See also Wade v. *Mississippi Cooperative Extention Service*, 528 F.2d 508, 516 (5th Cir. 1976) (racial discrimination); *Stepp* v. *Estelle*, 524 F.2d 447, 453 (5th Cir. 1975) (intelligent waiver of counsel); *East* v. *Romine, Incorporated*, 518 F.2d 332, 338-39 (5th Cir. 1975) (sex discrimination).

Applying this distinction to *Doyle*, the second and third elements—whether the teacher's conduct or expression was a motivating factor in the Board's decision and whether the Board would have reached the same decision anyway—are primarily questions of subsidiary fact to which the clearly erroneous rule applies. It is hard to conceive of issues that usually involve more credibility and other evaluative choices than what motivated someone and what the person would have done absent that motivation. The district court found that Leach and the Board were motivated primarily by Givhan's "demands" in deciding not to rehire her. That finding is not clearly erroneous. The court did not make an express finding as to whether the same decision would have been made, but on this record the appellants do not, and seriously cannot, argue that the same decision would have been made without regard to the "demands." Appellants seem to argue that the preponderance of the evidence shows that the same decision would have been justified, but that is not the same as proving that the same decision would have been made. In support of this argument appellants rely, *inter alia*, on several incidents from the 1969-70 school year. See n. 7 *supra*. There is no evidence that Leach or the Board relied on these incidents or were concerned about them in 1971. Reliance on these incidents becomes

even more attenuated when it is noted that Givhan's principal at Riverside and the Board were aware of them yet rehired her for the 1970-71 school year. Therefore appellants failed to make a successful "same decision anyway" defense.

The first element of the *Doyle* standard, whether the plaintiff has proved that her conduct was constitutionally protected, is an "ultimate fact" based on subsidiary facts such as who communicated what to whom, when, and in what manner. The district court's findings of these subsidiary facts are not clearly erroneous. Although the testimony is conflicting as to what authority Givhan and Leach each thought Leach had with regard to cafeteria personnel and NYC workers, there is no dispute that she gave him a list of "demands," "requests," or complaints, among which were the references to these two subjects.[12] The question, then, is whether those expressions were constitutionally protected. That is a question of ultimate fact, which we can determine independently. *E. g., Causey, supra.*

Not all expression by a government employee is constitutionally protected. The determination of constitutional protection entails striking "a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State as employer, in promoting the efficiency of the public services it performs through its employees." *Doyle, supra* at 284, 97 S.Ct. at 574, 50 L.Ed.2d at 481-82; *Pickering* v. *Board of Education*, 391 U.S. 563, 568, 88 S.Ct. 1731,

[12] There is some evidence that Givhan subsequently orally reminded Leach of her complaints in private conversation. This reminder and the list constituted the "unreasonable demands" which the court found primarily motivated Leach in his recommendation. This finding seems somewhat inconsistent with the court's characterization of Givhan as a "vocal critic of the district's policies and practices." Perhaps "active" would be a more appropriate adjective than "vocal."

1734, 20 L.Ed.2d 811, 817 (1968). We often have been called upon to strike that balance.[13]

But before doing so we must determine whether on the facts of this case the teacher had a First Amendment interest *as a citizen* in making complaints to the principal. We have been cited to and have found no cases precisely in point. Here, in effect, a public employee privately voiced complaints and expressed opinions to her immediate superior. There is no allegation or evidence that the decision not to rehire her was due to information communicated in these expressions as to her religion, her associations with others, or her plans to bring her complaints and opinions to public attention.[14] Indeed, the

[13] *See, e. g., Abbott* v. *Thetford*, 5 Cir., 534 F.2d 1101, (en banc), *rev'g and adopting dissenting opinion*, 529 F.2d 695 (5th Cir. 1976), *cert. denied*, —— U.S. ——, 97 S.Ct. 1598, 51 L.Ed.2d 804 (1977), (interference of Chief Probation Officer's expression in the form of a lawsuit with his work relationship with agencies sued justified dismissal by Juvenile Court Judge); *Smith* v. *United States*, 502 F.2d 512, 516, 518-19 (5th Cir. 1974) (the possibility of effect on patients of symbolic speech in form of wearing a peace pin constituted substantial interference with duties of wearer as staff psychologist at a Veterans Administration hospital).

Appellants did not expressly defend on the ground that Givhan's expression substantially interfered with her work or with her relationship with Leach, and the district court made no express finding as to substantial interference. The district court's finding that Givhan's complaints were neither constant nor unreasonable might be taken as a finding that there was no substantial interference with her work. As to the finding of reasonableness, the testimony was conflicting, as noted above. There is no real dispute, however, as to whether the complaints were "constant." Although Leach referred to *lists* of demands, he could cite only Givhan's occasional complaints about NYC workers, integration of the office staff and administration, and cafeteria personnel. In view of our disposition of the case we need not reach the issue of substantial interference.

[14] The loyalty oath and other cases make clear that requirements for public employment or public office cannot infringe on First Amendment rights to freedom of religion, association, and speech. *See, e. g., United States* v. *Robel*, 389 U.S. 258, 88 S.Ct. 419, 19 L.Ed.2d 508 (1967) (prohibition of defense employment due to membership in the Communist Party); *Whitehill* v. *Elkins*, 389

record does not indicate that Givhan ever made public complaints or suggestions through letters to newspapers or periodicals, letters or remarks to the school Board, remarks at public meetings, telephone calls to radio talk shows, distribution of pamphlets, or the like. Without authority precisely in point, we turn to general freedom of speech principles.

The free speech clause is designed "to remove governmental restraints from the arena of public discussion." *Cohen* v. *California*, 403 U.S. 15, 24, 91 S.Ct. 1780, 1788, 29 L.Ed.2d 284, 293 (1971). It is a guarantee to individuals of their personal right "to make their thoughts public and put them before the community." *Curtis Publishing Company* v. *Butts*, 388 U.S. 130, 149, 87 S.Ct. 1975, 1988, 18 L.Ed.2d 1094, 1107 (1967). The result is a "marketplace of ideas," in which debate is "uninhibited, robust, and wide open." *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 759, 96 S.Ct. 1817, 1824, 48 L.Ed.2d 346, 357 (1976); *Bond* v. *Floyd*, 385 U.S. 116, 136, 87 S.Ct. 339, 349, 17 L.Ed.2d 235, 247 (1966). A school and the area around it can be a forum for public discussion. *Grayned* v. *City of Rockford*, 408 U.S. 104, 118, 92 S.Ct. 2294, 2304, 33 L.Ed.2d 222, 233 (1972); *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503, 506, 89 S.Ct. 733, 21 L.Ed.2d 731, 737 (1969).

U.S. 54, 88 S.Ct. 184, 19 L.Ed.2d 228 (1967) (overbroad loyalty oath deters advocacy and associations protected by the First Amendment); *Keyishian* v. *Board of Regents*, 385 U.S. 589, 87 S.Ct. 675, 17 L.Ed.2d 629 (1967) (seditious utterances, advocacy of forceful overthrow of government, and membership in the Communist Party); *Elfbrandt* v. *Russell*, 384 U.S. 11, 86 S.Ct. 1238, 16 L.Ed.2d 321 (1966) (freedom of association deterred by overbroad loyalty oath); *Baggett* v. *Bullitt*, 377 U.S. 360, 84 S.Ct. 1316, 12 L.Ed.2d 377 (1964) (same); *Torcaso* v. *Watkins*, 367 U.S. 488, 81 S.Ct. 1680, 6 L.Ed.2d 982 (1961) (freedom of religion infringed by requirement that public officials declare belief in the existence of God).

Citizens would be deterred from contributing to this public marketplace of ideas if their opportunities for public employment or other public benefits might be adversely affected by their expressions. Consequently, public employment can be denied or terminated on account of the employee's constitutionally protected expression only when the interest of the state as employer and provider of services outweighs the First Amendment interest. *Pickering*, *supra*, 391 U.S. at 568, 88 S.Ct. at 1734, 20 L.Ed.2d at 817; *see* n. 13 *supra*. The three leading Supreme Court cases on teacher dismissals and freedom of speech illustrate the importance of protecting the right of public expression. In *Pickering* a teacher was dismissed for sending a letter to a local newspaper that was critical of the way in which the Board and superintendent had handled past proposals to raise new revenues for the schools. The Court, speaking through Justice Marshall, concluded that on the facts of *Pickering*

> the interest of the school administration in limiting teachers' opportunities contribute to *public debate* is not significantly greater than its interest in limiting a similar contribution by any member of the general public.

391 U.S. at 573, 88 S.Ct. at 1737, 20 L.Ed.2d at 820 (emphasis added).

Likewise, in *Perry* v. *Sindermann*, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972), a teacher alleged, *inter alia*, that he was not rehired in retaliation for his public criticism of the college's Board of Regents. This public criticism appeared in the form of a newspaper advertisement over Sindermann's name and his testimony before committees of the Texas legislature. The district court granted summary judgment, on virtually the pleadings alone, for the defendants, and this court reversed. 430 F.2d 939 (5th Cir. 1970). The Supreme Court affirmed, saying in part:

> The respondent has alleged that his non-retention was based on his testimony before legislative committees and his other *public statements* critical of the Regents' policies. And he has alleged that this *public criticism* was within the First and Fourteenth Amendments' protection of freedom of speech. Plainly, these allegations present a bona fide constitutional claim. For this Court has held that a teacher's *public criticism* of his superiors on matters of public concern may be constitutionally protected and may, therefore, be an impermissible basis for termination of his employment.

Id. at 598, 92 S.Ct. at 2698, 33 L.Ed.2d at 578 (emphasis added).

Doyle completes the trilogy. The crucial incident giving rise to Doyle's First Amendment claim was a telephone call he made to a disc jockey at a local radio station conveying the substance of a memorandum relating to teacher dress and appearance circulated by a school principal. The Court accepted the district court's conclusion that this communication was protected by the First Amendment because the Board's "reaction to his communications to the radio station was [nothing] more than an ad hoc response to Doyle's action in making the memorandum *public*." 429 U.S. at 284, 97 S.Ct. at 574, 50 L.Ed.2d at 482 (emphasis added).

The strong implication of these cases is that private expression by a public employee is not constitutionally protected.[15] Recent cases add support to this dichotomy.

[15] This implication also can be found in our teacher dismissal and freedom of speech cases. *See, e. g., Megill* v. *Board of Regents, supra* (context of remarks justified Board action; remarks, however, were clearly public, and included expressions in a press conference, in a newspaper interview, in a panel discussion attended by 50 people, at a public meeting on campus, and at a meeting of the Board); *Kaprelian* v. *Texas Woman's Univ.*, 509 F.2d 133, 139 (5th Cir. 1975) (teacher protected in voicing and applying in his teaching

This Term the Court has held that a state may not, through its public employment relations scheme, restrict the right of teachers to express themselves at a school board meeting open to the public. *City of Madison, Joint School District* v. *Wisconsin Employment Relations Commission*, 429 U.S. 167, 97 S.Ct. 421, 50 L.Ed.2d 376 (1976). The state commission found the school district guilty of engaging in negotiations with a member of a bargaining unit other than the exclusive representative by allowing a teacher to speak on an issue related to contract negotiations at a public Board meeting. The Court held this decision to violate the First Amendment:

> Regardless of the extent to which true contract negotiations between a public body and its employees may be regulated—an issue we need not consider at this time—the participation in *public discussion* of public business cannot be confined to one category of interested individuals.

Id. at 175, 97 S.Ct. at 426, 50 L.Ed.2d at 385. (Emphasis added). In his concurrence, in which Justice Marshall joined, Justice Brennan expressed the view that "the

academic views relevant to assignments); *Lewis* v. *Spencer*, 490 F.2d 93 (5th Cir. 1974), *aff'g*, 369 F.Supp. 1219 (S.D.Tex.1973) (appearance before state legislature and participation in organizing a local chapter of a teachers' association are protected); *Duke* v. *North Texas State Univ.*, 469 F.2d 829, 832 (5th Cir. 1972), *cert. denied*, 412 U.S. 932, 93 S.Ct. 2760, 37 L.Ed.2d 160 (1973) (teacher protected in her remarks to students and prospective students at a meeting in a campus park); *Moore* v. *Winfield City Bd. of Educ.*, 452 F.2d 726, 727 (5th Cir. 1971) (Board action not motivated by teacher's expressions, which included criticism of school administration in speech at a local Classroom Teachers Association dinner); *Pred* v. *Board of Pub. Instruction*, 415 F.2d 851, 853-54 (5th Cir. 1969) (participation in an organization and advocacy in classroom instruction of "demands" for campus freedom protected). *See also Abbott* v. *Thetford, supra* (substantial interference of expression with job justified dismissal; expression in the form of a lawsuit); *Smith* v. *United States, supra*, at 516 (substantial interference of expression with job justified dismissal; expression made by wearing of a peace pin).

First Amendment plainly does not forbid Wisconsin from limiting attendance" at a private bargaining session "and denying [teachers] the right to attend and speak at the session." 429 U.S. at 178, 97 S.Ct. at 428, 50 L.Ed.2d at 386. But, he continued:

> . . . [T]he First Amendment plays a crucially different role when, as here, a government body has either by its own decision or under statutory command, determined to open its decisionmaking processes to public view and participation. [footnote omitted]. In such case, the state body has created a *public forum* dedicated to the expression of views by the general public. . . . The State could no more prevent [the teacher] from speaking at this *public forum* than it could prevent him from publishing the same views in a newspaper or proclaiming them from a soapbox.

Id. at 178, 97 S.Ct. at 428, 50 L.Ed.2d at 387. (Emphasis added).

Finally, it should be noted that no one has a right to press even "good" ideas on an unwilling recipient. *Rowan* v. *United States Post Office Department*, 397 U.S. 728, 737, 90 S.Ct. 1484, 1490, 25 L.Ed.2d 736, 743 (1970) (to hold unconstitutional a statute authorizing addressee to stop mailings of pandering advertisements to him "would hardly make more sense than to say that a radio or television viewer may not twist the dial to cut off an offensive or boring communication"). *See also Lehman* v. *City of Shaker Heights*, 418 U.S. 298, 305, 307, 94 S.Ct. 2714, 2719, 41 L.Ed.2d 770, 778, 779 (1974) (Douglas, J., concurring) ("While petitioner clearly has a right to express his views to those who wish to listen, he has no right to force his message upon an audience incapable of declining to receive it.").[16]

---

[16] *Rowan* is arguably distinguishable because of the citizen's compelling interest in privacy within his or her own residence. *E. g., Organization for a Better Austin* v. *Keefe*, 402 U.S. 415, 420, 91 S.Ct. 1575, 1578, 29 L.Ed.2d 1, 6 (1971). The rationale of *Rowan*, however, is not limited to the home. It applies whenever "the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure." *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205, 209 & n. 5, 95 S.Ct. 2268, 2272 & n. 5, 45 L.Ed.2d 124, 131 & n. 5 (1975) (Powell, J.). While an intrusion on privacy in the home may be of greater significance than an intrusion on privacy in the workplace, one's "degree of captivity" in the workplace may be much greater. In the normal course of his job, principal Leach could hardly avoid exposure to teacher Givhan and her demands, requests, and complaints. Indeed, as a practical matter Leach was a very captive audience for Givhan as long as they both worked in the same school.

These general principles lead us to conclude that teacher Givhan did not engage in constitutionally protected speech in her expressions to principal Leach. Neither a teacher nor a citizen has a constitutional right to single out a public employee to serve as the audience for his or her privately expressed views, at least in the absence of evidence that the public employee was given that task by law, custom, or school Board decision. There is no evidence here that Givhan sought to disseminate her views publicly, to anyone willing to listen.[17] Rather, she brought her complaints to Leach alone. Neither is there evidence that the Board or Mississippi law delegated to Leach the task of entertaining complaints from all comers and that he discriminated in choosing to reject her complaints and not to rehire her because she impressed him into such service.

It is often said that hard cases make bad law.[18] This could be such a case. Many, if not most people would consider Givhan's expressions laudable. Protection of the

---

[17] Leach testified that he sent her lists of demands to the school superintendent. Apparently they were ignored. That does not alter the fact that Givhan chose Leach as the only recipient of her expressions.

[18] *E. g., In re Southwestern Bell Telephone Co.*, 542 F.2d 297, 298 (5th Cir. 1976) (en banc) (Hill, J., dissenting), *rev'd*, —— U.S. ——, 97 S.Ct. 1439, 52 L.Ed.2d 1 (1977).

First Amendment, however, does not turn on the social worth of ideas. *Police Department of Chicago* v. *Mosley*, 408 U.S. 92, 96, 92 S.Ct. 2286, 2290, 33 L.Ed.2d 212, 217 (1972); *Stanley* v. *Georgia*, 394 U.S. 557, 564, 89 S.Ct. 1243, 1247, 22 L.Ed.2d 542, 549 (1969); *Terminiello* v. *Chicago*, 337 U.S. 1, 4, 69 S.Ct. 894, 895, 93 L.Ed. 1131, 1134 (1949). If we held Givhan's expressions constitutionally protected, we would in effect force school principals to be ombudsmen, for damnable as well as laudable expressions. Perhaps it would be wise in terms of education and public employment to encourage anyone interested in public education to express their views and complaints to school principals. That policy, however, is a matter for Mississippi educators, school boards, state courts, and legislative bodies, for in the absence of constitutionally protected rights, federal courts are loathe to intrude into internal school affairs. *Bishop* v. *Wood*, 426 U.S. 341, 347-350, 96 S.Ct. 2074, 2079-80, 48 L.Ed.2d 684, 691-693 (1976); *Megill* v. *Board of Regents*, *supra*, at 1077; *Blunt* v. *Marion County School Board*, 515 F.2d 951, 956 (5th Cir. 1975).

Since Givhan has not prevailed on her First Amendment claim, her case is reversed and remanded for further district court proceedings, including determination of her *Singleton* claim.[19]

II. Hodges

As noted earlier, appellee Hodges served as guidance counselor at Glen Allan during the second semester of the 1969-70 school year and during the 1970-71 and 1971-72 school years. During the second semester of 1970 and the 1970-71 school year Hodges was one of three

[19] If on remand appellee succeeds on her *Singleton* claim, it will be for the district court in the first instance to determine the propriety of reinstatement as a remedy in accordance with our discussion of reinstatement as to *Hodges*, *infra*.

guidance counselors employed by the school district. Each was assigned to one of the district's three integrated schools. Ora Kelly (black), the counselor at O'Bannon, was reassigned as an elementary teacher for the 1971-72 school year because she did not qualify for license renewal. James Pollard (white), with the title of the school district's "head counselor" and the counselor assigned to Riverside, resigned at the end of the 1970-71 school year. Neither Pollard nor Kelly was replaced for the 1971-72 school year, leaving Hodges at Glen Allan as the school district's only guidance counselor.

District Superintendent Morris in March or April, 1972, decided to abandon the concept of a counselor for each school and instead to hire one counselor for the whole district for 1972-73. Tony Cintgran, a white, eventually was hired for this position. Around March 8, 1972, Hodges learned that Leach was recommending that she not be rehired. Leach and Harold Adams, assistant superintendent, told her that the reasons for the decision included parental opposition and her inability to get along with students.

In September, 1972, Hodges was informed of a vacancy in the district and applied to Superintendent Morris for the position. He refused her application, citing (1) her refusal to accept a fourth grade position for 1971-72 and (2) the "letter [Hodges] sent to Atlanta."

The latter reference was to Hodges' application to Atlanta University in the spring of 1972. The application had to be accompanied by the written recommendations of the principal and assistant principal. Hodges was not sure how long she had had the necessary forms for the recommendation and rating, but it suddenly dawned on her on Thursday, April 6, that the application was due on Monday, April 10. Since she was leaving on Friday the 7th for a meeting in Jackson, she decided it was imperative that the application be completed promptly.

She looked for principal Leach but could not find him. She approached Assistant Principal Givhan, who without knowledge of exactly what she wanted, told her that he was busy and to "get someone else to sign it for you." Hodges did exactly that. She wrote a recommendation, displaying "a lively appreciation of her own worth and abilities," [20] signed Leach's name to it, filled out the rating blank, and got someone else to sign Ms. Givhan's name to it.

Although Hodges was quite contrite about this episode at trial,[21] district officials learned of it only inadvertently. After completing and signing the forms, Hodges got a girl in the library to type the address on the envelope. The envelope was addressed inadequately, and the letter was returned to Leach. Leach apparently sent the letter to Superintendent Morris, who put it in Hodges' file. When Morris brought up the incident at the time she applied for a position in September, 1972, Hodges had difficulty remembering it. Morris refreshed her memory by showing her the letter. She admitted writing it, and Morris rejected her application.

The district court again avoided deciding whether there was an overall reduction in faculty positions making the *Singleton* order applicable. Instead the court thought that the counselor positions themselves were an appropriate group upon which to determine applicability of *Singleton*. It then concluded that there had occurred a reduction from three to one counselor positions between the 1971-72

---

[20] *Kaprelian* v. *Texas Woman's Univ., supra,* at 135 (Gee, J.).

[21] She testified that when she wrote and signed the recommendation she had little time and was otherwise "under pressure." She explained that she had signed other documents for Leach before, at his request, but she admitted that he did not authorize her to complete and sign in his name her own recommendation. It is also well established that when she had difficulty "finding" Leach for his recommendation she knew he had recommended that she not be rehired for the next school year.

and 1972-73 school years. The court acknowledged that Hodges had been the only counselor employed by the school district in 1971-72. However, the court observed that there had in fact been three counselor positions that year, with the district apparently either unable or unwilling to replace Kelly and Pollard. The court found that the district's scheme of employing counselors resulted in there being one instead of three positions in 1972-73, that *Singleton* therefore applied, and that since the school district did not apply "objective and reasonable non-discriminatory standards" in effecting the reduction, only "just cause" would excuse Hodges' nonretention. The court found no just cause. That finding is not clearly erroneous. Appellants contend that the court erred in applying *Singleton.*

We agree with the district court that the school district was still in the process of becoming a unitary system in 1972, that is, it was still in a *Singleton* situation. *See, e.g., United States* v. *Coffeeville Consolidated School District,* 513 F.2d 244, 247 (5th Cir. 1975); *United States* v. *Texas,* 509 F.2d 192, 193 (5th Cir. 1975). By its own terms, however, *Singleton* applies only "[i]f there is to be a reduction in the number of principals, teachers, teacher-aids, or other professional staff." Our recent cases establish that not only an arithmetic reduction is required, but a reduction related to desegregation. *Hardy* v. *Porter,* 546 F.2d 1165, 1167-68 (5th Cir. 1977) (former principal lost his *Singleton* protection when he left the system for "reasons unrelated to the desegregation process"); *Lee* v. *Chambers County Board of Education,* 533 F.2d 132, 135 (5th Cir. 1976); *Pickens* v. *Okolona Municipal Separate School District,* 527 F.2d 358, 361, 362 & n. 3 (5th Cir. 1976). As we said in *Lee, supra*:

> *Singleton* was designed to ensure that the transition from a dual to a unitary system, with all the concomitant logistical problems, would not occur in an un-

> fair treatment of black teachers and staff members. Oliver's demotion from the position of Assistant Attendance Supervisor to that of classroom teacher was not a result of the desegregation of Chambers County schools, but rather was necessitated by termination of the Title I funds that paid his salary.

A plaintiff seeking *Singleton* protection has the burden of proving the applicability of its terms. *Cf. Hardy* v. *Porter, supra; Lee* v. *Chambers County Board of Education, supra.* There is no evidence in this record that the reduction in counselor positions was related to desegregation, and the court made no such finding. Since the "desegregation-relatedness" aspect of *Singleton* may not have been entirely clear when the case was tried, it is appropriate to reverse and remand for further consideration of why the district changed its counselor employment scheme. If that change was not related to desegregation, *Singleton* would not apply to Hodges regardless of any reduction in the overall faculty related to desegregation, because elimination of *her* position would not have been so related. *Hardy* v. *Porter, supra.*

If the district court finds that Hodges was protected by *Singleton*, reinstatement in this case would be an inappropriate remedy for its violation. Reinstatement is a usual remedy for *Singleton* violations. *See, e.g., McLaurin* v. *Columbia Municipal Separate School District*, 530 F.2d 661, 665-66 (5th Cir. 1976); *Ward* v. *Kelly*, 515 F.2d 908, 912 (5th Cir. 1975); *Cornist* v. *Richland Parish School Board*, 495 F.2d 189, 191 (5th Cir. 1974). As Judge Godbold noted in *Hardy* v. *Porter, supra*, at 1168, the requirements of *Singleton* are equitable remedies designed to fashion relief for constitutional violations "in accordance with principles of fairness." Consequently, our reinstatement cases have been predicated on the plaintiffs' qualifications as school teachers and administrators. *E.g., Kelly* v. *West Baton Rouge Parish School Board*, 517 F.2d 194, 199 (5th Cir. 1975).

Also with a view toward equity, "just cause" is a good defense to school district action in violation of *Singleton. Thompson* v. *Madison County Board of Education*, 476 F.2d 676, 678-79 (5th Cir. 1973). As we said there,

> "Just cause" in a *Singleton* situation means types of conduct that are repulsive to the minimum standards of decency—such as honesty and integrity—required by virtually all employers of their employees, and especially required of public servants such as school teachers. . . For example, if a teacher came to school drunk, or was found stealing from the school treasury, or sexually assaulted a student . . . .

Although such conduct sometimes may not negate an employer's violation of an employee's rights, for example, because it was not relied upon by the employer in making a decision to discharge or not to rehire, it may preclude reinstatement as a remedy.[22] That is the case here. There is no evidence that Leach or the Board

---

[22] *E.g., Moore* v. *School Board*, 364 F.Supp. 355, 361 (N.D.Fla. 1973) (reinstatement inappropriate where teacher had abused authority by relating to students his personal experiences with prostitutes and other illegitimate topics). *See also Florida Steel Corp.* v. *NLRB*, 529 F.2d 1225, 1234 (5th Cir. 1976) (employee raised fist and cursed supervisor); *Trailmobile Division, Pullman Incorporated* v. *NLRB*, 407 F.2d 1006, 1018 (5th Cir. 1969) (reinstatement denied to striking employees who intimidated and assaulted nonstriking employee); *NLRB* v. *Big Three Welding Equipment Co.*, 359 F.2d 77, 83 (5th Cir. 1966) (reinstatement denied to employees who pilfered company property); *NLRB* v. *Bin-Dicator Company*, 356 F.2d 210, 215-16 (6th Cir. 1966) (reinstatement denied to employee who made "fearsome threats and gestures" to supervisors); *NLRB* v. *R.C. Can Company*, 340 F.2d 433, 435-36 (5th Cir. 1965) (reinstatement denied to employee who threatened to harm the plant manager); *NLRB* v. *Coca-Cola Bottling Co.*, 333 F.2d 181, 185 (7th Cir. 1964) (employee disqualified from reemployment by "his pattern of falsification and deceit during his employment"); *NLRB* v. *National Furniture Mfg. Co.*, 315 F.2d 280, 286 (7th Cir. 1963) (reinstatement denied because of "basic antagonism" between employee and employer).

relied on the incident relating to the unauthorized signatures in deciding not to rehire Hodges. After they learned of the incident, however, they rejected her application for a different position in September, 1972. Hodges wrote her own recommendation, signed Leach's name to it, and procured another teacher to sign Mr. Givhan's name on the rating blank, all with knowledge that these actions were not authorized and that the university would rely on the authenticity of the signatures. Such conduct was a type "repulsive to the minimum standards of decency . . . required by virtually all employers of their employees." *Thompson* v. *Madison County Board of Education, supra.* Her conduct particularly disqualified Hodges for the sensitive position of guidance counselor to young students.

Accordingly, we reverse and remand Hodges' case for further district court consideration of her *Singleton* claim. We leave to the district court the determination of Hodges' entitlement to attorneys' fees and to damages for the interim between the decision not to rehire her as a counselor and the decision not to consider her future employment because of her conduct in using unauthorized signatures on recommendations in her own behalf.

REVERSED and REMANDED.

RONEY, Circuit Judge, specially concurring:

I concur in the result reached by Judge Gewin in this case. I think that there are probably many occasions when First Amendment constitutional protection will reach private expression by a public employee, but I agree that the district court erred in casting this case in the First Amendment terms.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION

No. GC 66-1-S

HENRY B. AYERS, et al.,
Plaintiffs

and

MS. BESSIE B. GIVHAN, et al.,
Intervenors

v.

WESTERN LINE CONSOLIDATED SCHOOL DISTRICT, et al.,
Defendants

MEMORANDUM OF DECISION

This action is before the court on the intervention complaint of Mrs. Bessie G. Givhan (Givhan) and Mrs. Dollye W. Hodges (Hodges) seeking reinstatement as teachers in the schools operated by defendant Board of Education of the Western Line Consolidated School District (Western Line), back pay, attorneys' fees, and other relief.

The action has been tried to the court and is now ripe for decision. The court's findings of fact and conclusions of law based upon the record in the action sub judice and evidence introduced at the hearing on the merits, are incorporated in this memorandum of decision.

The court entered an order herein on January 12, 1970, directing defendants to convert a segregated school system into a unitary one. The order contained standard *Singleton* provisions with regard to the dismissal

and promotion of faculty and staff personnel during the desegregation process.[1] On January 21, 1970, the court entered a supplemental order dividing the district into two geographical zones for the assignment of students in grades one through eight. All children in grades nine through twelve were assigned to one school.

The court entered an order with consent of all parties on June 29, 1970, dividing the district into three geographical zones. There are three schools situated in the district, O'Bannon, Glen Allan and Riverside. Students in all grades were assigned according to residence to one or the other of the schools.

Givhan was an English teacher at Glen Allan during the 1970-71 school year. She was not tendered a contract for the 1971-72 term, although she had been a teacher in the school district for eight years. Prior to her employment at Westren Line, she taught for four years in the schools of an adjacent county.

The contract for Hodges was not renewed for the 1972-73 school year. At the time the initial desegregation order was entered, she was employed as a guidance counselor at Glen Allan. This was the position she held when discharged.

The *Singleton* provisions include:

> 1. Effective not later than February 1, 1970, the principals, teachers, teacher-aides, and other staff who work directly with children at a school shall be so assigned that in no case will the racial composition of a staff indicate that a school is intended for Negro students or white students. For the remainder of the 1969-70 school year, the district shall assign the staff described above so that the ratio of Negro to white

[1] Singleton v. Jackson Municipal Separate School District, 419 F.2d 1211 (5th Cir. 1969).

> teachers in each school, and the ratio of other staff in each, are substantially the same as each such ratio is to the teachers and other staff, respectively, in the entire school system.
>
> The school district shall, to the extent necessary to carry out this desegregation plan, direct members of its staff as a condition of continued employment to accept new assignments.
>
> 2. Staff members who work directly with children, and professional staff who work on the administrative level will be hired, assigned, promoted, paid, demoted, dismissed, and otherwise treated without regard to race, color, or national origin.
>
> 3. If there is to be a reduction in the number of principals, teachers, teacher-aides, or other professional staff employed by the school district which will result in a dismissal or demotion of any such staff members, the staff member to be dismissed or demoted must be selected on the basis of objective and reasonable non-discriminatory standards from among all the staff of the school district. In addition if there is any such dismissal or demotion, no staff vacancy may be filled through recruitment of a person of a race, color, or national origin different from that of the individual dismissed or demoted, until each displaced staff member who is qualified has had an opportunity to fill the vacancy and has failed to accept an offer to do so.
>
> Prior to such a reduction, the school board will develop or require the development of nonracial objective criteria to be used in selecting the staff member who is to be dismissed or demoted. These criteria shall be available for public inspection and shall be retained by the school district. The school district also shall record and preserve the evaluation of staff members under the criteria. Such evalu-

ation shall be made available upon request to the dismissed or demoted employee. 419 F.2d at 1217-18.

The threshold question is: Can plaintiffs claim the protection of the *Singleton* provisions? Defendant school district did not develop or adopt a nonracial objective criteria to be used in selecting the staff members to be dismissed or demoted.

Western Line claims that the nonracial objective criteria is to be used only where a staff member is either dismissed or demoted during staff reduction occasioned by the conversion to a unitary system. Plaintiffs contend that use of the criteria is required for all dismissals and demotions occuring during the period of desegregation.

The decision not to extend Givhan's contract was made during the first full school year of the desegregation process. The decision that a new contract would not be tendered Hodges was made during the second school year of such process.

A study of the record reveals that the school district had not become unitary when plaintiffs' contracts were not renewed and they were dismissed from the staff. United States v. State of Texas, 509 F.2d 192 (5th Cir. 1975); Youngblood v. Board of Public Instruction, 448 F.2d 770 (5th Cir. 1971).

Defendants rely on a stipulation made at the trial to show that plaintiffs were not dismissed as result of a reduction in staff. They support their position with the argument that at the beginning of the 1970-71 term, the teaching staff of the district aggregated 109 teachers and that the staff was increased to 125 for the following year, that being the 1971-72 term. It was during the 1970-71 term that Mrs. Givhan's contract was not renewed. Defendants assert that there was not a reduction in staff between the 1971-72 and 1972-73 terms. Mrs. Hodges contract was not renewed during the 1971-72

term. The stipulation reflects that the staff for the 1972-73 term was raised to 129, an increase of 4 of the former year. The critical period involved in this issue, is the one beginning with the 1970-71 term and ending with the 1972-73 term. The record reflects that 32 teachers left the school at the end of the 1970-71 term and 27 teachers left the school at the end of the 1971-72 term. Those leaving the school district at the end of the 1970-71 school term included 6 who were not recommended for reemployment, of which Givhan was one. Those leaving the district at the end of the 1971-72 term were 6, of which Hodges was one. It is noted in the case of Hodges, that there was, however, a reduction in the staff of counselors.

Plaintiffs take issue on the figures reflected by the stipulation. Plaintiffs filed a post-trial motion seeking to be relieved of the stipulation. Counsel for plaintiffs assert that a teacher-by-teacher count of the annual reports filed by defendants in this action and the computer printouts furnished by defendants in answers to interrogatories served upon them reflect an accurate count. Plaintiffs have used the corrected figures in presenting their argument to the court on this issue.

Plaintiffs contend that the correct tabulation is as follows:

For the School Year	Black Teachers	White Teachers	Total Teachers
1970-71	84	47	132*
1971-72	80	49	130*
1972-73	74	54	129*

Plaintiffs assert, therefore, that the correct figures show a reduction of staff during the pertinent period.

* Tabulations do not include one teacher at Glen Allan which was not characterized as either black or white.

Defendants object to the withdrawal of the stipulation, contending that if the stipulation had not been made, live testimony would have been offered at the trial to substantiate the figures and confirm the non-reduction of staff.

The court finds it unnecessary to resolve this controversy between the parties as to the expansion or reduction of the overall teaching staff in the Western Line Consolidated School District in the years in question. The need for resolving this issue concerning the stipulation is obviated by the court's disinclination to allow its decision on the merits to turn upon the tenuous distinction between the modest expansion of Western Line's teacher staff as defendants maintain was the case, or the very slight reduction for which plaintiffs argue. An examination of the statistics as to the overall teacher population in the defendant school district is unnecessary as to both plaintiffs. The court has concluded that Givhan is entitled to relief on First Amendment grounds entirely independent of *Singleton* and the defendant's failure to renew Hodges's employment contract contravened the *Singleton* provisions of the court's order previously entered in this case because the court interprets the record to indicate that there was in fact a drastic reduction of defendants' staff in Hodges's field of specialization, guidance counseling, in the year of Hodges's discharge.

Inasmuch as no hearing was held by the defendant school board on the issue of the non-renewal of plaintiffs' contracts, there are no findings of fact before the court now which may be reviewed under the substantial evidence rule of Thompson v. Madison County Board of Education, 476 F.2d 676, 678 (5th Cir. 1973). Consequently, the court was required to make its own inquiry as to the reasons for plaintiffs' non-renewal. United States v. Coffeeville Consolidated School District, 513 F.2d 244, 248 (5th Cir. 1975). The court's findings on the evidence presented at trial follow.

Givhan

In a letter dated May 1, 1971 and addressed to the superintendent of the school district, Leach recommended that Givhan's employment contract not be renewed for the 1971-72 school year and went on to make the following statement:

> "Mrs. Givhan is a competent teacher; however, on many occasions she has taken an insulting and hostile attitude toward me and other administrators. She hampers my job greatly by making petty and unreasonable demands. She is overly critical for a reasonable working relationship to exist between us. She also refused to give achievement tests to her homeroom students."

In response to Givhan's inquiry as to why she was not rehired for the 1971-72 school years, the superintendent of the district stated, in a letter to Givhan dated July 23, 1971, that the reasons were (1) her "flat refusal to administer standardized national tests to the pupils in her charge," (2) her "announced intention not to cooperate with the administration of the Glen Allan Attendance Center," and (3) her "antagonistic and hostile attitude to the administration of the Glen Allan Attendance Center throughout the school years."

At the trial, the rather generalized statements of Givhan's shortcomings contained in the May and July letters were particularized somewhat by testimony as to the specific incidents involving Givhan which served as the basis of the stated reasons for her discharge. Defendants offered evidence seeking to prove the following:

> (1) That Givhan made unreasonable demands upon the administration of the district, in the nature of complaints to her principal, including the following:

(a) That black Neighborhood Youth Corps workers were given more menial job assignments than similarly situated white workers; and

(b) That the lunchroom personnel were treated in a racially discriminatory manner by persons charged with management of the lunchroom.

(2) That on one occasion, Givhan failed to cooperate with the school administration in a weapons shakedown. The charge was that upon learning that a shakedown was to be held on the day in question, March 17, 1970, Givhan took a knife from a student in her classroom prior to the arrival of the personnel who were to perform the shakedown. Givhan allegedly returned the knife to the student prior to the end of the school day. Subsequently, another student was injured by the knife on the schoolgrounds through an "accidental fall."

(3) That Givhan intentionally graded the tests administered to white students in her classes lower than black students.

(4) That on one occasion, Givhan refused to administer an "achievement test" to the students in her classroom.

The court does not feel that the shakedown/knife incident served, or should have served, as a reason for the decision not to re-hire Givhan for the 1971-72 school year. The incident occurred prior to Leach's assumption of the principalship of the Glen Allan school in the Fall of 1970. The month following the incident, Givhan's then —principal recommended her for re-employment for the 1970-71 school year.

The testimony offered at trial concerning the charge that Givhan graded her students' papers in a racially discriminatory manner was insufficient and inconclusive.

There was a sharp conflict in the testimony concerning the charge that Givhan refused to administer a test to her students. Leach testified that he was required to secure the services of another teacher to administer the test, while Givhan testified that she did in fact give the test herself.

The court, as finder of fact, after hearing all the testimony and reviewing the exhibits introduced at the trial, has concluded that the primary reason for the school district's failure to renew Givhan's contract was her criticism of the policies and practices of the school district, especially the school to which she was assigned to teach. In Leach's words, Givhan was not re-hired because she was constantly "making petty and unreasonable demands." The court finds that Givhan's "demands" were not constant; Leach being able to testify specifically as to but two occasions. The court finds that those of Givhan's "demands" as were specifically brought to the court's attention were neither "petty" nor "unreasonable", insomuch as all the complaints in question involved employment policies and practices at Glen Allan school which Givhan conceived to be racially discriminatory in purpose or effect.

The court is aware of the considerable problems which occurred in this school district during the establishment of a unitary system in the 1969-70-71 period. There were several incidents of student and teacher demonstrations and other unpleasant manifestations of general discontent and unrest among the black community as to the course of the desegregation of Western Line School District. Most happily, the passage of time has dissipated the great majority of this friction. However, when the school district's decision to terminate Givhan's employment is placed into a setting contemporaneous with its conception and execution, it becomes clear to the court that the school district's motivation in failing to renew Givhan's

contract was almost entirely a desire to rid themselves of a vocal critic of the district's policies and practices which were capable of interpretation as embodying racial discrimination. The court conceives this to be a violation of Givhan's rights under the First Amendment to the Constitution of the United States. Perry v. Sindermann, 408 U.S. 593, 33 L. Ed.2d 570, 92 S. Ct. 2694 (1972); Pickering v. Board of Education, 391 U.S. 563, 20 L. Ed.2d 811, 88 S. Ct. 1731 (1968).

Hodges

As stated previously, the court is of the opinion that Hodges is entitled to *Singleton* protection which is available whenever "there is to be a reduction in the number of principals, teachers, teacher-aides, *or other professional staff* employed by the school district which will result in a dismissal or demotion of any such staff members . . . ." Singleton v. Jackson Municipal Separate School District, 419 F.2d 1211, 1218 (5th Cir. 1970). [Emphasis added].

In 1969, at the time the initial desegregation of the defendant school district, there were three counselor slots authorized on the staff of the defendant district, one at each of the three schools in the district. During the 1969-70 and 1970-71 school years, all three of these authorized slots were filled by counselors actually employed by the defendants. During the 1971-72 school year, the counselors employed at two of the schools in the district left defendants' employ for reasons not apparent from the record. During that year (1971-72) Hodges was assigned to Glen Allan and was the only counselor employed by the district. Apparently the district was unwilling or unable to employ counselors at the other two schools within the district.

In 1972-73, the school district altered its counseling operation drastically. Instead of assigning one counselor at each of the three schools within the district, one

"super" counselor was hired to cover the entire district at a salary approximately forty-three percent greater than that received by the highest paid of the three counselors in previous years.

In 1972-73, therefore, the authorized slots for counselors in the defendant school district decreased from three to one. Hodges, a black, was terminated from defendants' employ in 1972-73. A white "super" counselor was hired in 1972-73.

Viewing the situation regarding counselors in the defendant school district as a whole, the court is convinced that a reduction in counselor staff in the contemplation of *Singleton* occurred in the defendant school district in 1972-73 even though the number of persons actually employed by the defendant as counselors that year remained constant.

The court considers "counselor" to be a gender of school employee analogous to principal, teacher, and teacher-aide and, therefore, a sub-group in the contemplation of *Singleton*. Insomuch as there was a reduction in the counselor staff in the year of Hodges's termination and the Western Line School District did not employ "objective and reasonable non-discriminatory standards" in effecting the reduction in question as required by the *Singleton* provisions, the school district's failure to renew Hodges's contract may be allowed to stand only if the court is convinced that Hodges's discharge was for "just cause."

In determining if the failure to rehire Hodges was occasioned by "just cause", the court is instructed by Thompson v. Madison County Board of Education, 476 F.2d 676 (5th Cir. 1973).

> "Just cause" in a *Singleton* situation means types of conduct that are repulsive to the minimum standards of decency—such as honesty and integrity—

> required by virtually all employers of their employees, and especially required of public servants such as school teachers. *Id.* at 679.

Turning to the reasons for the non-renewal of Hodges's contract, such as the court has been able to determine, it appears that the initial step leading to Hodges's disemployment was the decision of Hodges's principal, Leach, not to recommend Hodges for employment for the 1972-73 school year. Leach testified his decision was made in the spring of 1972. This testimony is verified by Defendants' Exhibit 12, which is a Teacher Evaluation form dated March 9, 1972 and upon which Leach, in fact, recommended that Hodges's contract not be renewed for the coming school year. On the Teacher Evaluation form, Leach gave his reason for his failure to recommend to be the following: "Mrs. Hodges does not have the proper relationships with pupils, parents, and co-workers which is necessary for a guidance counselor."

At the trial in this action, the only concrete example of the bases for his conclusion that Hodges lacked "proper relationships" which Leach could offer concerned one incident which occurred in Leach's office. Apparently Hodges was having difficulties of a personal nature which on the occasion in questions caused her to become emotionally upset to the point of tears. Regardless of whether this one incident would warrant the loss of any job in any conceivable situation, it impresses the court as falling pitifully short of the "just cause" necessary to uphold a dismissal in a *Singleton* situation such as we have here.

The only other specific incidents of questionable conduct concerning Hodges which the defendants were able to bring to the attention of the court involved a form which recommended Hodges for admission to graduate school. Hodges completed the form, signed the name of her principal, Leach, to it, and mailed it to the graduate

school. In her testimony, Hodges freely admitted signing Leach's name to the form but claimed that it was customary for her to sign his name to papers of this sort and she felt that he would have no objection to her actions in this regard. Further, she stated that Leach was unavailable and it was imperative that the form be mailed at once.

Defendants characterized Hodges's conduct regarding the graduate school recommendation as forgery and dishonesty in the extreme, such as that which amounts to "just cause" for dismissal even in a *Singleton* situation.

Whatever the implications of this conduct by Hodges, it clearly has no bearing of the issue of Hodges's failure to be rehired for the 1972-73 school year. The graduate school recommendation ostensibly signed by Leach was dated and postmarked April 6, 1972. The fact that Hodges had signed Leach's name to the form did not become known to defendants until the envelope containing the form was returned to the sender (as reflected in the return address, Glen Allan Attendance Center) because a sufficient address for the intended recipient was lacking. Leach's decision not to recommend Hodges for continued employment was made and documented in March of 1972. There is nothing in the record to show that the board's acceptance of Leach's unfavorable recommendation as to Hodges was based upon anything more than Leach's unfavorable recommendation dated March 9, 1972 and containing no mention of the alleged "forgery."

In summary, the court finds that Givhan was dismissed from her job with defendants for reasons which impermissibly impinge upon her First Amendment right of freedom of speech. Hodges was not rehired by defendants under circumstances which fail to comply with the *Singleton* provisions of previous orders entered by this

court in this case. Both Givhan and Hodges are entitled to reinstatement (or an offer of reinstatement) as employees of the Western Line Consolidated School District upon terms equal or no less favorable than those plaintiffs would now be enjoying had they not been wrongfully terminated from defendants' employ.

Both plaintiffs are also entitled to back pay mitigated by their taxable earnings since the date of the termination of their employment with the defendant. Certain evidence was introduced at the trial concerning the extent of plaintiffs' monetary damages, but the court is unable to ascertain the proper amount of back pay due plaintiffs from the present state of the record. Accordingly, counsel will be directed to confer in an attempt to reach an agreement concerning the proper amount owed plaintiffs as a back pay award, failing which the court will received additional evidence in the nature of affidavits as to plaintiffs' earnings since their discharge.

Plaintiffs are likewise entitled to reasonable attorneys' fees pursuant to Section 718 of the Emergency School Aid Act of 1972, 20 U.S.C. § 1617, as well as their costs herein. Counsel will be directed to confer concerning the proper amount of the attorneys' fees award. Failing agreement by counsel on this point, the court will determine a proper award.

An order will be entered in accordance with the foregoing.

This 2nd day of July, 1975.

/s/ Irma R. Smith
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 75-3485

D. C. Docket No. CA-GC-66-1-S

HENRY B. AYERS, *et al.*,
Plaintiffs,

versus

WESTERN LINE CONSOLIDATED SCHOOL DISTRICT, *et al.*,
Defendants-Appellants,

versus

MS. BESSIE B. GIVHAN, *et al.*,
Plaintiffs-Intervenors-Appellees.

Appeal from the United States District Court
for the Northern District of Mississippi

Before GEWIN, RONEY and HILL, Circuit Judges

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Mississippi, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby remanded to the said District Court in accordance with the opinion of this Court;

It is further ordered that plaintiffs-intervenors-appellees pay to defendants-appellants, the costs on appeal to be taxed by the Clerk of this Court.

July 18, 1977

RONEY, Circuit Judge, concurring specially.
Issued as Mandate:

APPENDIX D

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

OFFICE OF THE CLERK

Edward W. Wadsworth
Clerk

Tel. 504-588-0514
600 Camp Street
New Orleans, La. 70120

October 27, 1977

TO ALL PARTIES LISTED BELOW:

No. 75-3485—HENRY B. AYERS, ET AL. v. WESTERN LINE CONSOLIDATED SCHOOL DISTRICT v. MS. BESSIE B. GIVHAN, ET AL.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition() for rehearing,** and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition() for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH
Clerk

By /s/ Brenda M. Hauck
Deputy Clerk

** on behalf of appellees, Ms. Bessie B. Givhan,

cc: Mr. J. Robertshaw
Mr. James L. Robertson
Messrs. Fred Banks, Jr.
Nausead Stewart
Phillip J. Brookins

APPENDIX

IN THE
Supreme Court of the United States
OCTOBER TERM, 1977

No. 77-1051

BESSIE B. GIVHAN,
Petitioner,

v.

WESTERN LINE CONSOLIDATED SCHOOL DISTRICT ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

PETITION FOR CERTIORARI FILED JANUARY 25, 1978
CERTIORARI GRANTED APRIL 3, 1978

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF CONTENTS—Continued

I. SELECTED DOCKET ENTRIES

A. District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION

No. GC 661-S

HENRY B. AYERS, et al.,
Plaintiffs,

and

MS. BESSIE B. GIVHAN, et al.,
Plaintiff-Intervenors,

v.

WESTERN LINE CONSOLIDATED SCHOOL DISTRICT, et al.,
Defendants.

DATE	PROCEEDINGS
1973	
Sept. 14	Intervention Complaint for Injunctive and Other Relief filed.
October 9	Answer and Motion to Strike filed.
1975	
May 7-8	Court Trial.
July 7	Order and Memorandum of Decision filed.
July 28	Notice of Appeal filed.
August 7	Order staying execution of judgment pending appeal filed.

B. Court of Appeals

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 75-3485

DATE	PROCEEDINGS
1975	
Sept. 17	Appeal Docketed.
1977	
March 21	Case argued and submitted.
July 18	Opinion filed.
July 18	Judgment filed.
August 15	Petition for Rehearing filed.
October 27	Order Denying Petition for Rehearing filed.

II. DESEGREGATION ORDERS AND OPINION ENTERED BEFORE PETITIONER'S COMPLAINT IN INTERVENTION

A. The Memorandum Opinion in GC 661, dated August 10, 1966 is printed as Appendix I of the Brief in Opposition.

B. Order in GC 661-S, dated January 12, 1970.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION

No. GC 661-S

HENRY B. AYRES, et al.,
Plaintiffs

v.

WESTERN LINE CONSOLIDATED SCHOOL DISTRICT, et al.,
Defendants

ORDER

Upon consideration of the record herein, it is

ORDERED:

1) That the provision of the Court's Orders of August 22, 1969 and October 2, 1969, in the aforesaid cause shall be and the same are rescinded and withdrawn;

2) That defendants shall file with the Clerk of the Court on or before January 19, 1970, a new plan for the operation of its schools which will eliminate the dual school system based on race or color, and permit defendants to begin operating a unitary system of schools with-

in which no person shall be effectively excluded from any school because of race or color;

3) That the said plan shall comply with the requirements of *Alexander* v. *Holmes County*, 1969, 24 L.ed 2d 19, and the terms, provisions and conditions (including time specified) in *Singleton* v. *Jackson Municipal Separate School System* (and consolidated cases en banc), —— F.2d —— (No. 26,285, December 1, 1969);

4) That defendants shall include in said plan, and implement the same by February 1, 1970, the following provisions:

DESEGREGATION OF FACULTY AND OTHER STAFF

The School Board shall announce and implement the following policies:

a) Effective not later than February 1, 1970, the principals, teachers, teacher-aides and other staff who work directly with children at a school shall be so assigned that in no case will the racial composition of a staff indicate that a school is intended for Negro students or white students. For the remainder of the 1969-70 school year the district shall assign the staff described above so that the ratio of Negro to white teachers in each school, and the ratio of other staff in each, are substantially the same as each such ratio is to the teachers and other staff, respectively, in the entire school system.

The school district shall, to the extent necessary to carry out this desegregation plan, direct members of its staff as a condition of continued employment to accept new assignments.

b) Staff members who work directly with children, and professional staff who work on the administrative level will be hired, assigned, promoted, paid, demoted, dismissed, and otherwise treated without regard to race, color, or national origin.

c) If there is to be a reduction in the number of principals, teachers, teacher-aides, or other professional staff employed by the school district which will result in a dismissal or demotion or any such staff members, the staff member to be dismissed or demoted must be selected on the basis of objective and reasonable non-discriminatory standards from among all the staff of the school district. In addition if there is any such dismissal or demotion, no staff vacancy may be filled through recruitment of a person of a race, color, or national origin different from that of the individual dismissed or demoted, until each displaced staff member who is qualified has had an opportunity to fill the vacancy and has failed to accept an offer to do so.

Prior to such a reduction, the schol board will develop or require the development of non-racial objective criteria to be used in selecting the staff member who is to be dismissed or demoted. These criteria shall be available for public inspection and shall be retained by the school district. The school district also shall record and preserve the evaluation of staff members under the criteria. Such evaluation shall be made available upon request to the dismissed or demoted employee.

"Demotion" as used above includes any reassignment (1) under which the staff member receives less pay or has less responsibility than under the assignment he held previously, (2) which requires a lesser degree of skill than did the assignment he held previously, or (3) under which the staff member is asked to teach a subject or grade other than the one for which he is certified or for which he has had

substantial experience within a reasonably current period. In general and depending upon the subject matter involved, five years is such a reasonable period.

MAJORITY TO MINORITY TRANSFER POLICY

The school district shall permit a student attending a school in which his race is in the majority to choose to attend another school, where space is available, and where his race is in the minority.

SCHOOL CONSTRUCTION AND SITE SELECTION

All school construction, school consolidation, and site selection (including the location of any temporary classrooms) in the system shall be done in a manner which will prevent the recurrence of the dual school structure once this desegregation plan is implemented.

5) That the School Board shall take such preliminary steps as may be necessary to prepare for complete student desegregation by February 1, 1970, if such desegregation is ordered by the Supreme Court;

6) That the School Board is directed to take no steps which are inconsistent with, or which will tend to prejudice or delay, a schedule to implement on or before February 1, 1970, such desegregation plan as may be ordered by the Court for full student desegregation;

7) That all orders heretofore entered in this cause which are in conflict with this order shall be and hereby are rescinded; that all orders not in conflict with this order shall remain in full force and effect;

8) That the Clerk of the Court shall mail a certified copy of this order to all counsel of record;

9) That the Court retain jurisdiction of the cause for the purpose of entering any further orders that may become necessary and appropriate;

10) That a hearing will be held by the Court on the plan submitted by the School Board and the plan previously submitted by the Health, Education and Welfare at 3:00 p.m., January 20, 1970, at the United States District Courthouse, Greenville, Mississippi;

11) That the School Board is not prevented or discouraged from considering and presenting to the Court for approval at a later date, the ungraded school concept, but that such a plan cannot be employed until a unitary school system has been established. *Anthony, et al.* v. *Marshall County Board of Education*, 5 Cir. 1969, —— F.2d —— [No. 28261 Slip Opinion dated December 1, 1969].

This the 12th day of January, 1970.

/s/ Orma R. Smith
United States District Judge

C. Order, dated January 21, 1970.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION

No. GC 661-S

HENRY B. AYERS, et al.,
Plaintiffs

v.

WESTERN LINE CONSOLIDATED SCHOOL DISTRICT, et al.,
Defendants

ORDER

In accordance with the ruling of the Court in open hearing on January 20, 1970, in the United States District Court, Greenville, Mississippi, it is

ORDERED:

1) That the student desegregation plan submitted to the Court on August 8, 1969, by the Department of Health, Education and Welfare, with certain exceptions herein noted, is adopted by the Court for implementation in the said school district commencing with the second semester of the 1969-70 school year.

STUDENT DESEGREGATION

2) That the defendant district shall be divided into two zones as follows: The portion of the district situated South of Mississippi Highway #12, shall constitute the "South Zone", and the portion of the district situated North of that highway shall constitute the "North Zone";

3) That all students in grades 1 through 6 residing in the South Zone shall be assigned to the Glen Allen Attendance Center, and all students in said grades residing in the North Zone shall be assigned to the O'Bannon Attendance Center; and

4) That all students residing in the district in grades 7 through 12 be assigned to attend the Riverside Attendance Center;

5) That students residing in defendant school district presently attending the schools of the Greenville Municipal Separate School District, shall be exempt from the provisions of this order for the balance of the 1969-70 school year, and may continue for the balance of said year to attend the schools at which they are presently in attendance;

6) That the school district shall have until and including February 9, 1970, to begin the second semester of the 1969-70 school year, and to implement the plan of the Department of Health, Education and Welfare as altered by this order;

7) That the school board is not prevented or discouraged from presenting to the Court for approval at a later date, the ungraded school concept, but that such a plan must insure that the school district will not revert to a dual system of schools;

8) That the provisions set forth in Paragraph (4) of the Court's order of January 12, 1970, shall be and the same hereby are adopted by reference for the governing of the schools of the defendant district;

9) That all the provisions of all prior orders entered herein which have not been rescinded, and are not in conflict with the provisions of this order are hereby specifically retained as effective orders of the Court herein;

10) That the Court retain jurisdiction of this cause for the purposes of entering any further orders which may become necessary and appropriate;

11) That certified copies of this Order shall be mailed by the Clerk of the Court by certified mail to all counsel of record.

This the 21st day of January, 1970.

/s/ Orma R. Smith
United States District Judge

D. Order approving amended attendance plan, dated June 29, 1970

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION

Civil Action No. GC 661-S

HENRY B. AYERS, *et al.*,
Plaintiffs,

VS.

WESTERN LINE CONSOLIDATED SCHOOL DISTRICT, et al.,
Defendants.

ORDER APPROVING AMENDED
ATTENDANCE PLAN

This cause having come on to be heard on motion of defendants for an amended attendance plan, and it appearing that both plaintiffs and defendants have agreed that paragraphs 5 and 6 of said motion all be stricken;

And, the Court having considered the same together with evidence introduced in previous hearings in this case, and being fully advised in the premises;

THE COURT IS SATISFIED AND DOES FIND

1. That the proposed zoning recommended by defendants has reasonable prospects of producing an unitary school system conforming to the requirements of the Constitution of the United States and should be given an opportunity to work;

2. That the proposed boundaries are reasonable in terms of economic transportation requirements, the physical capacities of the respective attendance centers involved, and the residential patterns of pupils both white and black; it is, therefore

ORDERED, ADJUDGED AND DECREED

3. That defendants shall maintain three attendance centers, each serving grades 1-12, inclusive, to be located at the present O'Bannon, Riverside and Glen Allan sites. All pupils residing within the attendance zone assigned to each center shall attend that center.

4. That the boundary between O'Bannon and Riverside centers may require changes in the future to adjust to population changes, so as to maximize integration and fully utilize physical plants, but, initially, it is described as:

Begin at the intersection of the line between ranges 8 and 9 with the centerline of Lake Lee; thence north along the range line to the southwest corner of Section 11-17-8; thence east to the southeast corner of Section 11-17-8; thence north along the east line of said section to its intersection with the centerline of a lateral canal maintained by Riverside drainage District; thence easterly along the centerline of said canal to its intersection with the centerline of Main Canal No. 9; thence south along the centerline of said main canal to the southwest corner of Section 27-17-8; thence east to the southeast corner of Section 28-17-8; thence south to the centerline of Mississippi State Highway No. 438; thence east along the centerline of said highway to the western boundary of WLCSD.

5. That the boundary between Riverside and Glen Allan attendance Centers shall be described as:

Beginning at the intersection of the south line of Section 17-15-9 (extended) with the thalweg of the Mississippi River; thence easterly along the south line of said section to the line between sections 19 and 30-15-8; thence due east along the section lines to the southwest corner of Section 20-15-7, a point on the western boundary of WLCSD.

6. That all the provisions of all prior orders entered herein which have not been rescinded and are not in conflict with the provisions of this order are hereby specifically retained as effective orders of the Court herein;

7. That the Court retain jurisdiction of this cause for the purpose of entering any further orders which may become necessary and appropriate;

8. That certified copies of this Order shall be mailed by the Clerk of this Court by certified mail to all counsel of record.

This the 29th day of June, 1970.

/s/ Orma R. Smith
ORMA R. SMITH
United States District Judge

APPROVED:

/s/ Melvyn R. Leventhal
MELVYN R. LEVENTHAL
Attorney for Plaintiffs

ROBERTSHAW, MEREDITH & SWANK

/s/ J. Robertshaw
J. ROBERTSHAW
Attorneys for Defendants

E. Order, in GC-73-29-S, dated August 31, 1973

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION

No. GC 73-29-S

MRS. BESSIE GIVHAN, et al.,
Plaintiffs,

v.

THE BOARD OF EDUCATION OF WESTERN LINE
CONSOLIDATED SCHOOL DISTRICT, et al.,
Defendants.

ORDER

Pursuant to the provisions of the Memorandum of Decision this day released in the captioned action, it is

ORDERED AND ADJUDGED:

1) That the action shall be, and the same hereby is, dismissed, subject, however to the right of plaintiffs to intervene in *Ayers, et al.* v. *Western Line Consolidated School District, et al.*, GC 66-1-S;

2) That the dismissal of this action shall be without prejudice to plaintiffs to file a complaint of intervention as above provided;

3) That permission is hereby granted the complainants to file the intervention aforesaid; and

4) That an executed copy of this order shall be filed by the clerk in *Ayers, et al.* v. *Western Line Consolidated School District, et al.*, GC 66-1-S, and shall evidence the

leave which the court has granted in this action to the plaintiffs to intervene in *Ayers.*

Dated: August 31, 1973.

/s/ Orma R. Smith
United States District Judge

III. PLEADINGS

A. Complaint in Intervention for Injunctive and Other Relief, and Attachments thereto, filed September 14, 1973

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION

[Title Omitted in Printing]

INTERVENTION COMPLAINT FOR INJUNCTIVE AND OTHER RELIEF

I

This is a suit in equity arising under the First, Thirteenth, and Fourteenth Amendments to the United States Constitution, Title VI of the Civil Rights Act of 1964, § 601, 42 U.S.C. § 2000d, and 42 U.S.C. §§ 1981, 1983 and 1985 to secure injunctive and other equitable relief from the racially discriminatory, arbitrary, capricious and otherwise unlawful discharge and refusal to rehire Black public school teachers by officials of the Western Line Consolidated School District.

II

Jurisdiction of this Court is envoked pursuant to 28 U.S.C. §§ 1331 and 1343. The matter in controversy exceeds the sum of ten thousand dollars, exclusive of interest and costs.

III

Plaintiff-intervenor, Bessie Givhan, a Black citizen of the United States and of the state of Mississippi, resides in Washington County, Mississippi and was employed by

the Western Line Consolidated Separate School District from September, 1963 until her termination by defendants in 1971. Plaintiff has a total of twelve (12) years teaching experience.

IV

Plaintiff-intervenor, Mary Butler, a Black citizen of the United States and of the state of Mississippi, resides in Washington County, Mississippi and had been employed by defendants two (2) years at the time of her dismissal. She has a total of eight (8) years experience as a teacher.

V

Plaintiff-intervenor, Dollye W. Hodges is a Black citizen of the United States and the state of Mississippi. She also resides in Washington County, Mississippi and had been employed by defendants. She has a total of five (5) years experience as a teacher and three (3) as a counselor, all of them in the Western Line School District.

VI

Plaintiffs-intervenors bring this action on their own behalf and on behalf of all others similarly situated. Class A consists of all Black teachers who were discharged or not rehired by the defendants since the 1969-70 school year as a result of racially discriminatory, arbitrary, capricious or unlawful action by the defendants, in violation of *Singleton* v. *Jackson Municipal Separate School District*, 419 F. 2d 1211 (5th Cir. 1969) and *Ayers* v. *Western Line Consolidated School District*, Civil Action No. GC 661-S. Class B consists of all Black teachers who were discharged or not rehired by the defendants for engaging in activities protected by the First and Fourteenth Amendments to the United States Constitution. Class C consists of all Black employees of the Western

Line Consolidated School District who have been discharged, or not rehired since the 1969-70 school year or otherwise discriminated against because of their Black race in violation of the Thirteenth and Fourteenth Amendments to the United States Constitution and 42 U.S.C. §§ 1981 and 1983.

This is an appropriate class action under Rule 23: the members of the classes on whose behalf plaintiffs sue are so numerous as to make it impracticable to bring them all individually before this Court; there are common questions of law and fact involved, common grievances arising out of common wrongs; common relief is sought for each plaintiff and for each member of the class; the plaintiffs named herein fairly and adequately represent the interests of the classes; defendants acted and refused to act on grounds applicable to the classes of plaintiffs generally. Moreover, the questions of law and fact common to the members of the classes predominate over any question affecting only individual members, and a class action is superior to other available methods for adjudication of the controversy, and is the most fair and efficient method.

VII

The defendant, Western Line Consolidated Board of Education (referred to hereinafter as "Board") is a public body organized and existing under the laws of the State of Mississippi. Defendant Harold N. Adams is sued individually and in his official capacity as Superintendent of the Western Line Consolidated Board of Education. The defendants, H. Y. Cochran, Chalmers E. Hobart, Wynn Starnes, Clyde Nichols, and W. T. Eifling are sued individually and in their capacity as members of the Washington County Board of Education. The defendant Board is charged under Mississippi law with maintaining and supervising schools under its jurisdic-

tion, including the hiring and rehiring of teaching personnel on an annual contract basis. The defendant is charged under Mississippi law with recommending to the defendant board teaching personnel to be rehired. At all relevant times set out hereinafter, defendants were acting under color of the laws of the State of Mississippi.

FIRST CAUSE OF ACTION

VIII

Plaintiff-intervenor Givhan and members of her class A were all public school teachers in the Western Line School District for the year 1971-72 and were notified during April and May of 1971 that their contracts would not be renewed.

IX

Plaintiffs-intervenors Butler and Hodges and members of their class A were all public school teachers in the Western Line School District for the year 1972-73 and were notified in March, 1972 that their contracts would not be renewed.

X

The Board's decision not to renew said contracts was based solely on the race of plaintiffs-intervenors and members of their class. Plaintiffs-intervenors and members of their class are well qualified to teach in the Western Line Consolidated School District and served satisfactorily within this school system as teachers and educators for many years.

XI

Defendant board acting under color of the authority vested in them by the laws of the State of Mississippi, refused to offer plaintiffs herein and other members of the plaintiff class contracts to teach in the Western Line

Consolidated School District for the 1971-72 and the 1972-73 school years. Said action resulted from the unitization of the Western Line School District.

XII

Defendants have a long history of discrimination in that they maintained dual school systems for Blacks and whites until ordered to provide and maintain a unitary school system in *Henry B. Ayers, et al.* v. *Western Line Consolidated School District*, Civil Action No. GC 661-S on the docket of the United States District Court for the Northern District of Mississippi.

XIII

On January 21, 1970, a decree was entered in *Ayers* adopting the school desegregation plan of the Department of Health, Education and Welfare which provides in relevant part:

Staff members who work directly with children, and professional staff who work on the administrative level will be hired, assigned, promoted, paid, demoted, dismissed and otherwise treated without regard to race color, or national origin.

If there is to be a reduction in the number of principals, teachers, teacher-aides, or other professional staff employed by the school district which will result in a dismissal or demotion of any such staff members, the staff member to be dismissed or demoted *must be selected on the basis of objective and reasonable non-discriminatory standards, from among all the staff of the school district.* In addition if there is any such dismissal or demotion, no staff vacancy may be filled through recruitment of a person of a race, color, or national origin different from

that of the individual dismissed or demoted, until each displaced staff member who is qualified has had an opportunity to fill the vacancy and has failed to accept an offer to do so.

Prior to such a reduction, the school board will develop or require the development of nonracial objective criteria to be used in selecting the staff member who is to be dismissed or demoted. These criteria shall be available for public inspection and shall be retained by the school district. The school district also shall record and preserve the evaluation of staff members under the criteria. Such evaluation shall be made available upon request to the dismissed or demoted employee.

XIV

Upon information and belief defendants have violated the above cited order: 1) Plaintiffs-intervenors and members of their class are as qualified or more qualified than many of the white teachers who have obtained contracts for the 1971-72 and 1972-73 school years; 2) Defendants have failed and refused to objectively consider the qualifications of all teachers in the defendant school district as a basis for determining which teachers were to be dismissed prior to the dismissal of plaintiffs-intervenors and members of their class; 3) Defendants will hire and have hired white teachers with qualifications and experience equivalent to or inferior to that possessed by plaintiffs-intervenors and the members of their class; 4) Defendants have recruited and employed teachers new to the system for alleged vacancies without first considering the qualifications of plaintiffs-intervenors and members of their class; 5) Defendants have failed to develop objective criteria to be used in selecting staff members to be dismissed or demoted.

XV

The teaching records of plaintiffs-intervenors and members of their class have been excellent, and the Boards' decision not to renew their contracts was based solely on the race of plaintiffs-intervenors and members of the plaintiff class, and violates their rights assured by the equal protection clause of the Fourteenth Amendment to the United States Constitution, the Thirteenth Amendment to the United States Constitution and the above cited order of the United States District Court.

SECOND CAUSE OF ACTION

XVI

Upon information and belief, plaintiff-intervenor Bessie Givhan and members of her class B were not rehired by defendants because plaintiff-intervenor Givhan and members of her class B exercised their rights of freedom of speech and freedom to petition government for redress of grievances as guaranteed by the First and Fourteenth Amendments to the United States Constitution. As such, the refusal of defendants to rehire plaintiff and members of the plaintiff class B violates their rights of free speech and academic freedom under the First and Fourteenth Amendments to the United States Constitution.

XVII

On December 1, 1970 plaintiff-intervenor Givhan was ordered by Defendant James S. Leach to administer the Our Development Achievement Test to her homeroom class. Ms. Givhan objected to giving the test because of other pressing school duties and requested that the guidance counselor give the test. However, at the insistence of Defendant Leach, plaintiff Givhan administered said test on that date.

XVIII

Throughout the school year 1970-71, plaintiff-intervenor Givhan made several request of Defendant Leach which she felt to be in the best interest of the school and the student body, among which were: (see Attachment A)

(a) that qualified Blacks be promoted from within the rank of the lunchroom personnel rather than hiring a white supervisor from outside;

(b) that Black NYC students not be given merely menial assignments, that they be given the same type jobs in the office of the Principal as was given to white students;

(c) that favoritism not be shown to certain students; and

(d) that the office staff be integrated.

XIX

During the first week in May, Ms. Givhan distributed to the teachers of the Glen Allen School a list of grievances developed by the Black teachers of the Western Line Consolidated School District.

XX

Also, during the first week in May, Ms. Givhan and other Black teachers requested and was granted a meeting with the Western Line Board members at which meeting said grievances were presented. (see Attachment B)

XXI

On May 3, 1971, Ms. Givhan circulated a bulletin to the teachers of the Glen Allen School stating that a civil

rights attorney would be meeting with the teachers of Western Line Consolidated School District on May 14, 1971.

XXII

On May 17, 1971 contracts were issued to the teachers who had been selected to teach at the Glen Allen School for the 1971-72 school year. Although plaintiff had been evaluated and rated as being a good teacher, she was not given a contract nor was she told why her contract had not been renewed. (see Attachments C, D & E)

XXIII

Plaintiff made several inquiries as to why her contract was not renewed. Finally on July 38, 1971 she received a letter from Defendant C. L. Morris, Superintendent of Western Line Consolidated School District, listing as the reasons for Defendants failure to rehire plaintiff, the following: (see Attachment F)

(a) a flat refusal to administer standardized national tests to the pupils in her charge;

(b) an announced intention not to co-operate with the administration of the Glen Allen Attendance Center;

(c) an atagonistic and hostile attitude toward the administration of the Glen Allen Attendance Center throughout the school year.

XXIV

Defendants' reasons listed for their failure to renew Ms. Givhan's contract were nothing more than a malicious, conspiratorial attempt to conceal the real reasons for her discharge—her activities as listed in paragraphs seventeen (17) through twenty-one (21).

XXV

The refusal of defendants to rehire Ms. Givhan and members of the plaintiff class was arbitrary, capricious, unreasonable and not based on any reasonable standard relating to the functions of a teacher in the Western Line Consolidated School District. As such, the refusal violates the rights of plaintiffs and members of the plaintiff class to due process and equal protection assured by the Fourteenth Amendment to the United States Constitution.

XXVI

The refusal of defendants to rehire plaintiffs and members of plaintiff Givhan's class was based on the race of said plaintiff and said plaintiff's protest against racial discrimination and is therefore in violation of their rights under 42 U.S.C. §§ 1981 and 1983 and the First and Thirteenth Amendments to the United States Constitution.

THIRD CAUSE OF ACTION

XXVII

Defendants have discriminated against plaintiffs-intervenors and other Black faculty and staff of the defendant school district in the following respects:

(1) they have demoted and/or dismissed Black principals, administrators, coaches, teachers and other Black staff and personnel.

(2) they have declined to promote or employ qualified Blacks for openings and have gone outside the system to recruit whites for such openings.

XXIV

Said actions by defendants violate the rights of plaintiffs-intervenors and the classes of Blacks they represent to equal employment opportunities guaranteed under the Thirteenth and Fourteenth Amendments to the United States Constitution and 42 U.S.C.A. §§ 1981 and 1983.

EQUITY

XXV

By virtue of the action of defendants described above in paragraphs eight (8) through twenty-four (24), plaintiffs-intervenors and the classes they represent are suffering irreparable injury, loss and harm. Plaintiffs-intervenors and their classes have no plain, adequate or complete remedy at law to redress the deprivations of their rights. Any other relief would be attended by such uncertainties and delays as to deny substantial relief and would cause plaintiffs-intervenors and their classes further irreparable injury, damage, vexation and inconvenience. Unless this Court grants the requested relief, plaintiff-intervenors and their classes will continue to suffer irreparable injury.

WHEREFORE, plaintiffs-intervenors respectfully pray that this Court:

1. Issue an injunction requiring the defendants, their agents, employees, successors, attorneys and those acting in concert and participation with them to offer plaintiffs-intervenors and members of their classes a contract in the Western Line Consolidated School District at the school and position at which they formerly were employed, in accordance with their qualifications and experience and without regard to race or color, and to continue such contracts without regard to the exercise by teachers in

the Western Line Consolidated School District of rights protected by the First and Fourteenth Amendments.

2. Issue an injunction prohibiting the defendants, their agents, employees, successors, attorneys and those acting in concert and participation with them from firing and refusing to rehire teachers employed by the Western Line Consolidated School District for arbitrary, capricious or unreasonable cause or reasons not based on any reasonable standards relating to the functions of teachers in the Western Line Consolidated School District.

3. Issue an injunction prohibiting the defendants, their agents, employees, successors, attorneys and those acting in concert and participation with them from engaging in the unlawful practices described in paragraph XI and XII and from continuing other practices shown to be in violation of 42 U.S.C.A. §§ 1981, 1983, 2000(e) and other applicable law.

4. Issue an order requiring defendants to reimburse plaintiff-intervenors and the classes they represent for all back pay and other allowances and privileges which they would have received but for their demotions, dismissal and/or failure to receive promotions.

5. Award plaintiff-intervenors, and the classes they represent, punitive damages in such amount as will insure and protect their rights against further encroachment by defendants.

6. Enjoin defendants from dismissing or directing any Black faculty member without prior application to and approval of this court.

7. Enjoin defendants to establish a bi-racial committee to oversee and otherwise superintend faculty dismissals, demotions, hirings and promotions.

8. Allow plaintiff-intervenors and their classes costs herein and all necessary expenses of the litigation, in-

cluding reasonable attorneys fees and all other such relief as may be equitable, just and proper.

Respectfully submitted,

/s/ Nausead Stewart
NAUSEAD STEWART
MELVYN R. LEVENTHAL
FRED L. BANKS, JR.
ANDERSON, BANKS, NICHOLS
& LEVENTHAL
Post Office Drawer 290
Jackson, Mississippi 39205

Attorneys for Plaintiff-Intervenors

ATTACHMENT A

WESTERN LINE CONSOLIDATED
SCHOOL DISTRICT
GLEN ALLAN ATTENDANCE CENTER
Glen Allan, Mississippi 38744

December 7, 1970

Mr. C. L. Morris, Superintendent
Western Line Consolidated School District
Avon, Mississippi

Dear Mr. Morris:

I was handed a list of requests from Mrs. Givhan recently, and some of these were reasonable requests for supplies, etc., but some were unreasonable in my opinion.

For instance, she wanted the Black N.Y.C. girls to help with the office work instead of dusting and cleaning for which they were hired. She was very loud and arrogant in expressing her opinion of this. Mrs. Givhan is in my office every day or so making this type demands.

A few days later she came to my office very upset about Mrs. Maddox placing a white woman in the cafeteria who also takes up tickets and sells milk. She said that we were prejudiced by placing a white woman in the "choice" position of the cafeteria.

Sincerely,

/s/ James S. Leach
JAMES S. LEACH

ATTACHMENT B

REQUESTS OF THE CONCERNED TEACHERS OF THE WESTERN LINE SCHOOL DISTRICT

1. Evaluation sheets prepared by the principal of each school on the teachers serving under him should be prepared in duplicate, reviewed with the individual teacher, initialed by the teacher, and a carbon copy of the report given to the teacher prior to submitting the evaluation sheet to the superintendent of education of the district.

2. Evaluation sheet should be prepared on each teacher at least quarterly, and reviewed as outlined in item no. 1.

3. Any complaints lodged against a teacher, by principal, fellow teacher, parent, student, or any other citizen should be reviewed in the presence of the teacher complained against immediately upon receipt of the complaint, whether in writing or oral.

Answer to 1, 2 and 3, taken from the Teacher Handbook, Page 12. The principals have made an evaluation of the teachers.

THE BOARD OF TRUSTEES OF WESTERN LINE SCHOOL DISTRICT TEACHER EVALUATION

It is the policy of the Board of Trustees that each teacher shall at least annually formally evaluate his work, himself and that, likewise, at least annually each teacher shall be formally evaluated by an administrator (his principal, assistant principal or supervisory staff in the central office). The formal evaluation should be accomplished not later than April 1 each year beginning with the 1970-71 session. The evaluation should be concluded with a conference between the teacher and the

administrator or administrators to compare their own evaluations.

Three copies of each evaluation shall be made: one set to become the property of the teacher; one to be placed under security in the principal's office; and one set under security in the superintendent's office.

The administrator should begin getting evidence for evaluation beginning at the first of the school year. Judgments should be based on all the broad contacts the administrator has with the teacher, but there should be as many classroom visits as possible in addition. To the maximum extent possible, objective data should be used both by the teacher and administrator to support judgments reached. For example: records can be gotten of the use of the library by the students taught; likewise, improvement of pupils on standard tests; the teacher can cite activities in professional activities in professional associations and readings done for improvement, etc.

The establishing of performance targets by both parties is an extremely important part of the entire evaluative process.

The evaluation includes but cannot be limited to the evaluative instrument. The teacher's job is too comprehensive for that.

The sole purpose of evaluation is the improvement of instruction by revealing strengths and weaknesses of personnel. The results of it should influence the in-service program. It should make the administrators more aware of what is taking place in the classrooms. It should make teachers more responsive to the opportunities they have in meeting needs of pupils. It should help in determining specific interests and competencies among staff members. It should provide evidence for dismissal where this is an issue. In short, evaluation

is a prime essential to both individual and organizational improvement.

12

4. It appears that there are presently dual standards for determining whether teachers may obtain outside employment while under a teacher contract with this school district. At the present time, there are at least two white teachers who have outside employment, while all requests by black teachers have been denied.

4. The dual employment has not been enforced where it did not interfere with the teacher's performance as a teacher. Driving a bus does. A teacher driving a bus does not arrive at school at 8:00 A.M. or stay until 3:45 as the other teachers do. He can not stay to a faculty meeting if there is one after school, nor can he have duty schedule that others do. This was brought drastically to mind, after the mid-term last year. Some of the teachers were late to school almost every day, and other teachers had to be in their classrooms.

There are more blacks holding two jobs than whites.[1] Eddie Chambers has a wholesale candy distributorship, A. T. Williams has a grocery store, Cicero Hall works at the A & P Store, James Ledbetter drives a cab, Dolly Hodges keeps extra books, William Givhan does income tax work to name a few.

5. The superintendent of education of this district refers to Mr. Wayne Tullos as the elementary principal of Riverside School; however, since he is also Title (1) Coordinator, this conflicts with the court order under which this school is presently operating.

5. The superintendent of education of this district has not referred to Mr. Tullos as anything except Title I Coordinator. Mr. Grisham has referred to him and been corrected.

6. Is Mr. Tullos the elementary principal? If not, who is?

6. No. There is no elementary principal at Riverside.

7. Teachers should be placed teaching grades or subjects for which they are certified to teach, and not assigned to other fields, particularly where there are uncertified people presently working in areas where there are available certified teachers assigned to areas in which they are uncertified.

7. The assignment of teachers in their field has been given great consideration. To get necessary white-black ratios, some were out-of-field this year What is a qualified teacher?

8. Only teachers who are qualified to teach in a particular area should be assigned to the State Text Book Review Committee.

8. This was done, except foreign languages. None were available.

9. On the basis of seniority, within the system, teachers should be given preference on subject matter, and the school to which they are to be assigned, within the limits of the Court order.

9. This is done as nearly as possible. Subject area, color, ability and need are the factors in placement of teachers.

10. The salary penalty for sick leave should be applied equally to black teachers and white teachers. At the present time, some teachers are docked $10.00 per day for each sick day in excess of ten days per school year. There are certain white teachers who have been paid their full salary while taking sick days in excess of ten per school year.

10. This is done for whites and blacks. Two teachers signed contracts knowing they were pregnant.

11. Unless a substitute teacher is hired to replace a teacher out on sick leave, the $10.00 should not be deducted from salary.

11. To be fair—each teacher is charged the $10 if he misses. If the teacher is not there, he has not performed his duty, whether a substitute is hired or not.

12. When a teachers' salary is suspended for sick days in excess of ten per session, what is done with the portion of the teachers salary which comes from the State?

12. Most of this can be taken from the district supplement. If not, there is an adjustment on the sheets made by the County Superintendent of Education.

13. All administrative personnel, should be paid the same salary for comparable qualifications and experience.

13. They are, as nearly as possible.

14. If any assistant principals are assigned additional teaching duties, all assistant principals should be required to accept that additional burden.

14. We have one qualified assistant principal. Other assistant principals in order to receive the Minimum Program money have to teach in their field ½ day. The size of the school has another thing to do with this.

15. For what period of time has the superintendent of the Western Line School District been hired?

15. Until July, 1973.

16. In classroom situations where there is a supervising teacher and an assistant teacher, blacks should be assigned as supervisers as well as assistants. At the

present time, in all dual teaching situations only whites are assigned as supervising teachers.

16. Is this question trying to get ready for next year? We have a single teacher in each classroom, except a remedial classroom with two black teachers.

17. The curriculum of the Western Line School District should be brought up to date to fit the needs of the students.

17. It is constantly being changed.

18. There should be a PTA or PTSA organization at each school in the district.

18. The PTA is an organization of the parents and teachers. It is not the duty of the administration to say they must have or not have a PTA at each school. If the concerned teachers want a PTA, they should help organize it.

19. What ratio (black and white) is used in hiring Titled (1) teachers?

19. Most of the Title I personnel are blacks.

20. What are the qualifications for a principal in the Western Line School District?

20. A Principal must have 12 hours of Administration Courses, as required by the State Accrediting Commission. A "AA" certificate is desirable, but not required.

21. What are the qualifications for assistant principal in the Western Line School District?

21. The same as principal.

22. It is our understanding that the superintendent has contacted a white individual outside the school system to become Director of Counselors. There are pres-

ently within the system qualified black counselors. Why is the superintendent seeking a Director of Counselors from outside the system?

22. When he recommends a guidance counselor, the person will be competent, fully qualified and an emotionally stable person.

23. What are the qualifications for Elementary Supervisor at Glen Allan School?

23. Qualifications for Elementary Supervisor at Glen Allan are the same as at each of the other schools. Mrs. Worthington has been an elementary supervisor in the district for over 10 years.

24. The position of ESEA Director is open. Who will fill it.

24. Is it open? Applications will be processed and considered, if it is.

25. At least one weeks notice should be given to Titled (1) programs. This information should be made available to the newspapers, radio stations, TV stations, students, teachers and parents at least one week prior to the program.

25. The final approval of the program was not received until long after it was started. It was given to papers.

26. The Titled (1) advisory committee should be consulted in the pre-planning of Titled (1) Programs.

26. The Title I Committee helped in the planning of the program. This was not typed until after the committee met. Changes that were made were at the State Department level.

27. Baccalaureate services should be held at all schools in the district.

27. Does Greenville have Baccalaureate services?

28. All schools in the district should have junior-senior proms.

28. This is an individual school choice. It is our understanding that all three schools have proms scheduled for this year.

29. All schools in the district should be allowed to have student clubs, organizations, year books, newspapers and other extra curricular activities.

29. No school has been kept from having school clubs, organizations, year books, newspapers, or other extra curricular activities. Teacher laziness in not wanting to be a sponsor could be the reason.

30. When do the teachers receive *Contracts* for the 1971-72 school year.

30. Have you considered that while special meetings are held, and answers to questions are being made that the contracts could have being typed and the trustees could have been considering the teacher recommendations.

31. Why have not the teachers received service awards for the past two years.

31. Lack of cooperation from the teachers and turnoil have made the giving of service pins of secondary importance.

32. Who get incentive pay from the school fund? How much is the incentive pay given special teachers?

32. This question implies that certain teachers receive extra as incentive pay. The district received $23,114 Incentive Grant. The district supplements the MEP Funds for teacher salaries. This money is used to help with this supplement. No teacher is supplemented above the regular supplement.

33. What teachers personally own Materials as record players, 16MM projectors, filmstrip machines etc.? Equipment does exist in schools, is hoarded in special classrooms and is not shared by fellow-teachers, if such owned by the Western Line District.

33. Certain materials are owned by teachers. Some equipment is assigned on an individual basis by the principal, and the other equipment is centrally located in each school where it can be obtained by using correct procedures.

EMPLOYEE EVALUATION FORM

NAME: Mrs. Bessie Givhan DATE: 4/16/71

DEPARTMENT: Junior High JOB TITLE: Teacher - English

Purposes of this Employee Evaluation:

To take a personal inventory, to pin-point weaknesses and strengths and to outline and agree upon a practical improvement program. Periodically conducted, these Evaluations will provide a history of development and progress.

Instructions:

Listed below are a number of traits, abilities and characteristics that are important for success in business. Place an "X" mark on each rating scale, over the descriptive phrase which most nearly describes the person being rated. (If this form is being used for self-evaluation, you will be describing yourself.)

Carefully evaluate each of the qualities separately.

Two common mistakes in rating are: (1) A tendency to rate nearly everyone as "average" on every trait instead of being more critical in judgment. The rater should use the ends of the scale as well as the middle, and (2) The "Halo Effect," i.e., a tendency to rate the same individual "excellent" on every trait or "poor" on every trait based on the *overall* picture one has of the person being rated. However, each person has strong points and weak points and these should be indicated on the rating scale.

ACCURACY is the correctness of work duties performed.

			X	
Makes frequent errors.	Careless; makes recurrent errors.	Usually accurate; makes only average number of mistakes.	Requires little supervision; is exact and precise most of the time.	Requires absolute minimum of supervision; is almost always accurate.

ALERTNESS is the ability to grasp instructions, to meet changing conditions and to solve novel or problem situations.

			X	
Slow to "catch on."	Requires more than average instructions and explanations.	Grasps instructions with average ability.	Usually quick to understand and learn.	Exceptionally keen and alert.

CREATIVITY is talent for having new ideas, for finding new and better ways of doing things and for being imaginative.

			X	
Rarely has a new idea; is unimaginative.	Occasionally comes up with a new idea.	Has average imagination; has reasonable number of new ideas.	Frequently suggests new ways of doing things; is very imaginative.	Continually seeks new and better ways of doing things; is extremely imaginative.

 Form 103

[THIS ATTACHMENT HAS BEEN RECONSTRUCTED FROM AN IDENTICAL FORM IN ORDER TO ALLOW LEGIBLE REPRODUCTION FOR THE JOINT APPENDIX.]

ATTACHMENT C

DEPENDABILITY is the ability to do required jobs well with a minimum of supervision.

			X	
Requires close supervision; is unreliable.	Sometimes requires prompting.	Usually takes care of necessary tasks and completes with reasonable promptness.	Requires little supervision; is reliable.	Requires absolute minimum of supervision.

DRIVE is the desire to attain goals, to achieve.

			X	
Has poorly defined goals and acts without purpose; puts forth practically no effort.	Sets goals too low; puts forth little effort to achieve.	Has average goals and usually puts forth effort to reach these.	Strives hard; has high desire to achieve.	Sets high goals and strives incessantly to reach these.

JOB KNOWLEDGE is the information concerning work duties which an individual should know for a satisfactory job performance.

			X	
Poorly informed about work duties.	Lacks knowledge of some phases of work.	Moderately informed; can answer most common questions.	Understands all phases of work.	Has complete mastery of all phases of job.

QUANTITY OF WORK is the amount of work an individual does in a work day.

			X	
Does not meet minimum requirements.	Does just enough to get by.	Volume of work is satisfactory.	Very industrious; does more than is required.	Superior work production record.

STABILITY is the ability to withstand pressure and to remain calm in crisis situations.

			X	
Goes "to pieces" under pressure; is "jumpy" and nervous.	Occasionally "blows up" under pressure; is easily irritated.	Has average tolerance for crises; usually remains calm.	Tolerates most pressure; likes crises more than the average person.	Thrives under pressure; really enjoys solving crises.

COURTESY is the polite attention an individual gives other people.

	X			
Blunt; discourteous; antagonistic.	Sometimes tactless.	Agreeable and pleasant.	Always very polite and willing to help.	Inspiring to others in being courteous and very pleasant.

FRIENDLINESS is the sociability and warmth which an individual imparts in his attitude toward customers, other employees, his supervisor and the persons he may supervise.

		X		
Very distant and aloof.	Approachable; friendly once known by others.	Warm; friendly; sociable.	Very sociable and out-going.	Extremely sociable; excellent at establishing good will.

PERSONALITY is an individual's behavior characteristics or his personal suitability for the job.

		X		
Personality unsatisfactory for this job.	Personality questionable for this job.	Personality satisfactory for this job.	Very desirable personality for this job.	Outstanding personality for this job.

PERSONAL APPEARANCE is the personal impression an individual makes on others. (Consider cleanliness, grooming, neatness and appropriateness of dress on the job.)

			X	
Very untidy; poor taste in dress.	Sometimes untidy and careless about personal appearance.	Generally neat and clean; satisfactory personal appearance.	Careful about personal appearance; good taste in dress.	Unusually well groomed; very neat; excellent taste in dress.

PHYSICAL FITNESS is the ability to work consistently and with only moderate fatigue. (Consider physical alertness and energy.)

			X	
Tires easily; is weak and frail.	Frequently tires and is slow.	Meets physical and energy job requirements.	Energetic; seldom tires.	Excellent health; no fatigue.

ATTENDANCE is faithfulness in coming to work daily and conforming to work hours.

			X	
Often absent without good excuse and/or frequently reports for work late.	Lax in attendance and/or reporting for work on time.	Usually present and on time.	Very prompt; regular in attendance.	Always regular and prompt; volunteers for overtime when needed.

HOUSEKEEPING is the orderliness and cleanliness in which an individual keeps his work area.

				X
Disorderly or untidy.	Some tendency to be careless and untidy.	Ordinarily keeps work area fairly neat.	Quite conscientious about neatness and cleanliness.	Unusually neat, clean and orderly.

OVERALL EVALUATION In comparison with other employees with the same length of service on this job:

Definitely unsatisfactory.	Substandard but making progress.	Doing an average job.	X Definitely above average.	Outstanding.

COMMENTS

Major weak points are—

1. _____
2. _____
3. _____

and these can be strengthened by doing the following:

_____

Major strong points are—

1. _____
2. _____
3. _____

and these can be used more effectively by doing the following:

Mrs. Givhan is a good English teacher, but likes to put pressure and demands on Administration.

Rated by /s/ James B. Leach (Name) Principal (Title)

(If not used as a self-evaluation form, the employee should sign below)

A copy of this Report has been ~~given to me and has been~~ discussed with me.

/s/ Bessie B. Givhan (Employee's Signature) 4-29-71 (Date)

Printed in U.S.A.

ATTACHMENT D

WESTERN LINE CONSOLIDATED SCHOOL DISTRICT
GLEN ALLAN ATTENDANCE CENTER
Glen Allan, Mississippi 38744

April 16, 1971

Mr. Morris:

This evaluation was made considering Mrs. Givhan's teaching performance only. As you will note, she has a good rating as far as classroom teaching is concerned. However, Mrs. Givhan has been arrogant toward me and has placed pressure and demands on me at various times throughout the year.

She has also made derogatory remarks about you, and, on several occasions has agitated Mrs. Hodges about her assignment of students and other phases of her work.

/s/ James S. Leach

ATTACHMENT E

GLEN ALLAN ATTENDANCE CENTER
Glen Allan, Mississippi

May 1, 1971

Mr. C. L. Morris, Superintendent
Western Line Consolidated School District
Avon, Mississippi

Dear Mr. Morris:

Mrs. Bessie Givhan, Junior High English Teacher, is not recommended to return to Glen Allan Attendance Center for the school year 1971-72.

Mrs. Givhan is a competent teacher; however, on many occasions she has taken an insulting and hostile attitude toward me and other administrators. She hampers my job greatly by making petty and unreasonable demands. She is overly critical for a reasonable working relationship to exist between us. She also refused to give achievement tests to her homeroom students.

I feel that it would be in the best interest of our school and community that Mrs. Givhan not return to our school.

Sincerely yours,

/s/ James S. Leach
JAMES S. LEACH,
Principal

ATTACHMENT F

WESTERN LINE CONSOLIDATED SCHOOLS
Avon, Mississippi 38723

C. L. Morris
Superintendent

July 28, 1971

Mrs. Bessie B. Givhan
1260 Holmes Street
Greenville, Mississippi 38701

Dear Mrs. Givhan:

Please excuse my delay in replying to your letter of July 14. I have been on a rather short vacation.

Under the statutory procedure for hiring teachers, new contracts are submitted to teachers only when they have been recommended by the principal, recommended by the superintendent and approved by the Board of Trustees. You were not recommended for a new contract by the principal of the Glen Allen Attendance Center where you are assigned.

Our records reflect that the reason why you were not recommended for re-hiring were: (1) a flat refusal to administer standardized national tests to the pupils in your charge; (2) an announced intention not to co-operate with the administration of the Glen Allan Attendance Center; (3) and an antagonistic and hostile attitude to the administration of the Glen Allan Attendance Center demonstrated throughout the school year.

At your request, a copy of this letter is being furnished to Mr. C. J. Duckworth, Executive Secretary, Mississippi

Teachers Association-N.E.A., 1328 Lynch Street, Jackson, Mississippi 39203.

Yours very truly,

/s/ C. L. Morris
C. L. MORRIS, Supt.
Western Line Consolidated School District

CLM/cmr.

[Certificate of Service Omitted]

B. Answer and Motion to Strike, dated October 5, 1973

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION

[Title Omitted in Printing]

ANSWER AND MOTION TO STRIKE
MOTION TO STRIKE

Defendants move to strike the following from the Intervention Complaint for Injunctive and other Relief: (1) paragraph VI; and, (2) the words, "and members of her Class A", "and members of their class A", "and members of their class", "members of the plaintiff class", "and members of her class B", "and members of the plaintiff class B", wherever said words appear; and, (3) paragraph XXVII, and in support of their motion, respectfully show that in the Memorandum of Opinion rendered in *Mrs. Bessie Givhan, et al.* v. *The Board of Education of Western Line Consolidated School District, et al.*, Civil Action No. GC 73-29-S upon the docket of this Court, under date of August 31, 1973, this Court held:

> "The court does not believe that the rights sought to be enforced by plaintiffs against the school District give rise to a class action. Especially this is true where the number of persons who could be involved is limited, and the complaints would not be common to all parties. Each individual's complaint will involve facts and circumstances peculiar to the individual."

Pages 6-7.

Defendants show that the Intervention Complaint for Injunctive and other Relief is, except for the caption, virtually identical to the Complaint filed in *Givhan, supra*, that the plaintiffs are the same, and that the ruling of this Court denying the plaintiffs the right to maintain a class action is binding in this action upon plaintiff-intervenors.

ANSWER

FIRST DEFENSE

The Intervention Complaint for Injunctive and other Relief fails to state a claim against the defendants upon which relief can be granted.

SECOND DEFENSE

1. Defendants admit jurisdiction of this Court under the order entered in *Givhan, supra*, and therefore need not respond to paragraphs I and II.

2. Defendants admit the allegations of paragraphs III-V, except that they deny that the employment of any plaintiff-intervenor was terminated or that any were dismissed. Defendants allege that each was employed on a year to year contract without tenure, that none was under any legal obligation to continue in employment beyond the contract period, and that in each instance the then current contract of each plaintiff-intervenor expired of its own terms.

3. Defendants do not respond to the allegations of paragraph 6, for the reason that the issues therein raised have been resolved adversely to plaintiff-intervenors' claims in *Givhan, supra*.

4. Defendants deny the allegations of paragraph VII except they admit that Western Line Consolidated School District of Washington and Issaquena Counties, Mississippi, is a defendant in this cause, that H. T. COCHRAN, CHALMERS E. HOBART, WINON STARNES, CLYDE NICHOLS, and W. T. EIFLING are the present members of the Board of Trustees of that district, and that as such are responsible for maintaining and supervising the operation of the district schools and for recommending teachers to be hired by the Washington County Board of Education, a distinct and separate entity. None of the defendants named in the Intervention Complaint are parties to any contract with any teacher, including plaintiff-intervenors.

5. Defendants deny the allegations of paragraph VIII and IX, except that they admit GIVHAN was under contract to teach for the school year, 1970-71, that she was notified in May of 1971 she would not be asked to contract for the succeeding year, that HODGES and BUTLER were under contracts to teach during the school year 1971-72, and that they were notified during or about March of 1972 that they would not be asked to contract for the succeeding year.

6. Defendants deny the conclusions of law and fact contained in paragraphs X-XIII, except that they admit entry of an order in this cause on 21 January 1970, which order speaks for itself.

7. Defendants deny the allegations of paragraph XIV. They show that in compliance with the order of 21 January 1970, the entire district was divided into a northern and a southern zone with all elementary students in the former zone assigned to O'Bannon center and all in the latter to Glen Allan center, and that all high school students were assigned to Riverside center, in the geographical middle of the district. They allege that this action was taken in the middle of the 1969-1970 school year, and that effective with the second semester of that year, the "dual system", if any existed, was completely eliminated. They show further that this arrangement did

not work to the satisfaction of either plaintiffs or defendants, and that on 29 June 1970 a consent order was entered creating the present organization of the district into three attendance zones. They allege that since the second semester of the 1969-1970 year, all "vestiges" of the former system have been eliminated "root and branch", that all re-assignment and re-alignment of teaching and professional personnel in this reorganization of the district to comply with the Court's orders were accomplished prior to the commencement of the 1970-1971 school year, and that the failure to re-hire plaintiff-intervenors had no relation to the order directing reorganization of the district. Defendants specifically allege that the acts or failure to act upon which plaintiff-intervenors rely occurred after the reorganized district had been in operation for at least one and one half full school years, and that none of them has been or claims to have been demoted or dismissed.

8. Defendants deny the allegations of paragraphs XV and XVI.

9. With references to paragraphs XVII through XXIII, the allegations are admitted, except:

a. All teachers in the appropriate class ranges were required to administer the achievement test referred to in paragraph XVII. GIVHAN flatly refused to do so, and did not in fact administer the test. Upon information and belief, GIVHAN refused to comply with the direct order of the school administration that the test be administered because of her personal belief that it might discriminate against blacks.

b. Defendants have no knowledge nor means of knowledge as to who actually developed the list of grievances referred to in paragraph XIX nor as to any favoritism shown "certain students", and deny the related allegations. Defendants allege that GIVHAN violated district

policy that all pupils be treated alike, regardless of race, specifically in that she gave failing grades to white students for correct work.

c. Defendants deny GIVHAN was not given the reasons why she was not tendered a new contract, and show that the reasons were in fact reduced to writing in attachment F to the intervention complaint. They allege that this plaintiff was hired as a classroom teacher and that the allegations of paragraphs XVII through XXIII affirmatively show the accuracy of reasons (b) and (c) of paragraph XXIII, quoted from attachment F. They allege that her constant concern with matters outside the scope of her employment was disruptive and not in the best interest of the educational process. They show that although a few of the "demands" made by this plaintiff-intervenor were reasonable and were granted, by far the greater number of them were outside of areas of her responsibility and were unreasonable.

10. Defendants deny the allegations of paragraphs XXIV through XXVI and specifically point out that at the same time plaintiff-intervenor GIVHAN was not selected for re-employment, her husband (also a black) was promoted to assistant principal.

11. Defendants do not respond to the allegations of paragraphs XVII and XVIV for the reason that they relate to a class action, covered by the Motion to Strike filed herewith, on which this Court has already ruled adversely to plaintiff-intervenors contention in *Givhan, supra.*

12. Defendants deny the allegations of paragraph XV and deny that plaintiff-intervenors are entitled to relief in this action.

THIRD DEFENSE

Employment and re-employment of teachers is governed by Mississippi law, and they are employed under succes-

sive one-year contracts. Defendants agree that they may not refuse to re-hire a teacher on the basis of race, religion, or because of assertion of constitutionally protected rights, each case being dependent upon its own facts. However, defendants allege that they are charged with responsibility for maintaining high educational standards, and that in the discharge of this responsibility they have a discretion vested in them by law and are charged with the duty of eliminating teachers who are ineffective, who are uncooperative, who fail to implement district policies or refuse to do so, who refuse to perform duties assigned to them and indiscriminately to all other teachers, or who fail to meet reasonable standards of integrity.

Defendants allege that reasons for their failure to re-hire plaintiff-intervenor GIVHAN abundantly appear in her own intervention complaint and in the Second Defense, above. Plaintiff-intervenor HODGES, who had been employed as a counselor to young pupils, was not re-hired (among other reasons) for sending forged recommendations to Atlanta University in connection with her application for summer work, not considered by defendants as compatible with minimal standards of integrity required of a person expected to set an example for and to counsel pupils of the district. Plaintiff-intervenor BUTLER was not re-hired because she is ineffective and a marginal teacher, the dominating purpose of defendants being to upgrade the professional standards of district teachers.

FOURTH DEFENSE

The intervention complaint affirmatively shows that plaintiff-intervenors were not demoted or dismissed during the term of any contract to teach, but only that they were not re-hired. Defendants are under no contractual obligation to plaintiff-intervenors to re-hire them or any

of them, and plaintiff-intervenors are under no contractual obligation to perform duties beyond the term of their former respective contracts. There is no statutory or other duty to give notice to teachers of any intention not to re-hire, or to afford any evidentiary hearing prior to a decision not to re-hire. However, any teacher believing that he or she was not re-hired because of race, religion, sex or the assertion of any constitutionally protected right or rights, has the right to request and is entitled to an evidentiary hearing. None of the plaintiff-intervenors has requested any such evidentiary hearing, they have not exhausted their procedural rights before the defendant board of trustees, and this action is premature and should be dismissed.

/s/ J. Robertshaw

J. ROBERTSHAW
P. O. Drawer 1498
Greenville, Mississippi 38701
(601) 335-6181

Attorney for named defendants

[Certificate of Service Omitted]

IV. OPINIONS AND JUDGMENTS

A. District Court's Memorandum of Decision, dated December 18, 1973

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION

[Title Omitted in Printing]

MEMORANDUM OF DECISION

The plaintiff-intervenors (plaintiffs), on March 16, 1973, filed with the clerk of this court a separate action against the defendants in the action sub judice, seeking redress for certain wrongs said to have been inflicted upon them by defendants, when plaintiffs were not retained on the faculty of defendant school district in the years 1971-72 and 1972-73. *Givhan, et al.* v. *The Board of Education of the Western Line Consolidated School District, et al.*, No. GC 73-29-S.

After a full consideration of the matter, the court concluded that it was not proper for plaintiffs to maintain a separate action in this school desegregation case, but, that they should seek redress in the action sub judice, since the basis of their complaint was the alleged violation by defendants of the court's desegregation order entered in this action on January 21, 1973.

Accordingly, the court, on August 31, 1973, entered an order dismissing the complaint. At the same time the court granted leave to plaintiffs to seek a vindication of their rights in the action sub judice by way of intervention.

The plaintiffs are three former black teachers in the schools of defendant school district, who claim they were dismissed from the school system in violation of the *Singleton* faculty and other staff desegregation provisions [1] incorporated in the court's said order.

Plaintiffs sought to prosecute their complaint in No. GC 73-29-S as a class action consisting of "[a]ll others similarly situated, class A consists of all Black teachers who were discharged or not rehired by the defendants for the 1971-72 and 1972-73 school years as a result of racially discriminatory, arbitrary, capricious or unlawful action by the defendants, in violation of *Singleton* v. *Jackson Municipal Separate School District*, 419 F.2d 1211 (5th Cir. 1969); class B consists of all Black teachers who were discharged or not rehired by the defendants for engaging in activities protected by the First and Fourteenth Amendments to the United States Constitution."

In the Memorandum of Decision entered in No. GC 73-29-S, as a result of which the action was dismissed and plaintiffs were given the right to intervene in this action, the court said:

> The court does not believe that the rights sought to be enforced by plaintiffs against the school district give rise to a class action. Especially this is true where the number of persons who could be involved is limited, and the complaints would not be common to all parties. Each individual's complaint will involve facts and circumstances peculiar to the individual.

The plaintiffs seek to prosecute the intervention-complaint in the action sub judice as a class action following

---

[1] Singleton v. Jackson Municipal Separate School District, 419 F.2d 1211 (5th Cir. 1969).

the pattern proposed by them in No. GC 73-29-S. The defendants have moved the court to strike all allegations of class representation which are contained in the intervention-complaint.

The plaintiffs charge that the defendant school district violated the *Singleton* provisions of the court's order aforesaid, by refusing to retain them in the system for the years in question. There are probably ten other black teachers who were not retained in the system by defendant school district during the years in question.

It appears to the court that the rights of each such teacher may well be governed by a factual situation not common to that of others. The number involved is small, and each teacher who has a grievance against the school district has a forum in the action sub judice in which to enforce any right which he or she may have. The class is not such, in the judgment of the court, as meets the prerequisites of Rule 23, F.R. Civ. P.

The court will enter an order determining that the action may not be maintained as a class action, and sustaining defendants' motion to strike.

This action of the court does not, however, dispose of the right of plaintiffs to have defendants answer the interrogatoies which have been propounded to them by plaintiffs.

The motion of defendants to stay discovery will be overruled.

An appropriate order will be entered.

Dated, this the 18th day of December, 1973.

/s/ Orma R. Smith
United States District Judge

B. The District Court's Memorandum of Decision, dated July 2, 1975, is printed as Appendix B of the Petition.

C. The Opinion of the Court of Appeals, dated July 18, 1977, is printed as Appendix A of the Petition.

D. The Judgment of the Court of Appeals, dated July 18, 1977, is printed as Appendix C of the Petition.

E. The Court of Appeals' Denial of Petition for Rehearing and Suggestion for Rehearing En Banc is printed as Appendix D of the Petition.

V. SELECTED EXCERPTS FROM THE RECORD

A. Transcript of Proceedings of May 7 and 8, 1975

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION

[Title Omitted in Printing]

The following proceedings were had in the United States District Court for the Northern District of Mississippi, in Greenville, Mississippi, on May 7 and 8, 1975, before The Honorable Orma R. Smith, Judge.

APPEARANCES:

For the Plaintiffs:

Honorable Fred L. Banks, Jr.
Honorable Nausead Stewart
Jackson, Mississippi

For the Defendants:

Honorable J. Robertshaw
Greenville, Mississippi

[2] (Greenville, Mississippi, Wednesday, May 7, 1975, 9:00 a.m.)

(The following transpired in open court.)

THE COURT: Be seated, please.

Ladies and Gentlemen, are you prepared to proceed this morning? Counsel for the plaintiffs, are you ready?

MR. BANKS: The plaintiffs are ready, Your Honor.

THE COURT: Mr. Robertshaw, are you prepared to proceed?

MR. ROBERTSHAW: If the Court please, the defendants are ready.

THE COURT: All right.

MR. ROBERTSHAW: May I make a statement?

THE COURT: Yes, sir.

MR. ROBERTSHAW: Pending extensive discovery in the case as to statistics—and I think that we can probably take about five minutes and agree on a set of statistics that will save a good bit of time in the trial.

THE COURT: [3] All right, sir. Do you want a recess?

MR. ROBERTSHAW: Do you want us to do it now?

THE COURT: You may confer with counsel for whatever period of time you need to get the statistics together.

(Counsel for both sides conferring off the record.)

MR. ROBERTSHAW: May I address the Court?

THE COURT: Yes, sir.

MR. ROBERTSHAW: Plaintiffs and defendants stipulate that the statistical data on the following exhibits may be taken as true for the purposes of this cause: Table 1 is a table covering the period 1969-70 school year through 1973-74, showing the number of teachers, both black and white; the number of teachers leaving at the

end of that session, both black and white; and the percentage of turnover, black and white.

Table 2 shows the population of pupils and teachers by race in the school year as reflected in the reports, shown first in October '69, which was the beginning of the 1969-70 year. Next in February of '70, after the reconstitution of the district. Then November '70 and [4] October '71, 2, 3 and 4.

Table 3 breaks the teachers down into those who were hired, not rehired, and those who did not return for other reasons, voluntary withdrawal or whatnot, plus the number of teachers hired for each session, at the end of each session.

If I may have this submitted as Exhibit I.

THE COURT: Does that tabulate what you have said to the Court?

MR. ROBERTSHAW: Yes, sir.

THE COURT: All right, let it be received.

MR. ROBERTSHAW: I have an extra one of each of the exhibits, if the Court would like to have it to follow during the course of the trial.

THE COURT: All right, hand it to the Clerk and let it be received as a stipulated document. This is a copy of what the Clerk has, is that right?

MR. ROBERTSHAW: That is correct, sir.

(Stipulated Exhibit No. 1 received into evidence.)

Exhibit No. 2 is a chart graphically showing the [5] pupil population and the teacher population, by race, for the same periods as in Table 2.

THE COURT: Table 1, you mean?

MR. ROBERTSHAW: Well, there are three tables on the first exhibit.

THE COURT: I see. Table 2, all right. Let it be received.

(Stipulated Exhibit No. 2 received into evidence.)

MR. ROBERTSHAW: Exhibit No. 3 is the mechanical—the computations showing how the number of teachers hired at the end of each session was arrived at.

THE COURT: All right, let it be received.

(Stipulation Exhibit No. 3 received into evidence.)

MR. ROBERTSHAW: I might say, for the Court's convenience, that the technique adopted by plaintiffs, with which the defendants agree, is that you take the number of teachers at the beginning of the period and subtract from that the number of teachers that left the system at the end of the year, and then deduct the net figure from the number of teachers present at the beginning of the following year. So that the derived at figure should represent the number of teachers hired.

[6] THE COURT: All right, sir.

MR. ROBERTSHAW: And Exhibit 4 is the same thing, except for Glen Allan School only.

THE COURT: All right, let it be received.

(Stipulated Exhibit No. 4 received into evidence.)

Can you stipulate as to any other facts, or does this cover the entire stipulation which is to be submitted to the court?

MR. ROBERTSHAW: The stipulated facts presently in evidence contain virtually all of the discovery that we have been into, except that it is by numbers instead of names.

And, within the discovery there have been admitted certain other facts and figures that we, that is, as defendants consider already in evidence as admissions for the purposes of this trial.

THE COURT: Well, that may be true. But I don't want to have to go through the record and search out everything that has been admitted, or the extensive discovery that has been made.

There are certain facts that have not been stipulated, [7] and as the trier of the facts now, I would like to have it brought to my attention so I won't have to go through the record and search them out myself and maybe overlook some of them.

MR. ROBERTSHAW: If the plaintiffs would indicate which facts they desire to stipulate, we would be happy to consider those. Certainly, if we have admitted it, we will stipulate it.

THE COURT: All right, anything that has been admitted upon request for admissions that has been admitted as a matter as being a true fact, I want you to state it into the record here so that I can consider it as the trier of the facts.

In other words, as a result of your discovery, either by interrogatories or requests for admissions, if certain facts have been established as not having been controverted, then I would like to have that now.

Even if you don't have it in written form, you can orally state it into the record so I can, as the trier of the facts, I can take them into consideration, because I don't want to have to go through the entire record and search out all of the facts which have been admitted by admissions or by interrogatories.

[8] MR. ROBERTSHAW: The four exhibits that are already in evidence constitute the facts developed in discovery.

THE COURT: Statistically?

MR. ROBERTSHAW: Which we desire to be stipulated to.

THE COURT: From statistics that you have?

MR. ROBERTSHAW: Yes, sir.

THE COURT: In other words, it reflects what your records shows?

MR. ROBERTSHAW: It reflects what the record shows, with certain additions to bring them up to date.

THE COURT: All right. Are there any other facts

now to be considered by the Court as being noncontested?

MISS STEWART: Yes, sir.

THE COURT: All right, give me that.

MISS STEWART: [9] We have a chart that sets out the numbers of guidance teachers which defendants have admitted in response to Plaintiffs' First Request For Admissions.

I thought it was in this file here.

THE COURT: Now, just a moment.

Miss Stewart, if you want this to get into the record, you are going to have to lift your voice so I can hear it and so the Court Reporter here can hear you as well. And when you are looking down at what you are reading your voice doesn't carry very well. So you will have to speak loud enough and distinct enough for us to get it into the record.

You say these charts that have been admitted as Exhibits 1 through 4 include all of the admitted facts with reference to the statistics?

MISS STEWART: With regard to all of the statistics except for guidance teachers, which I tried to get into the record.

THE COURT: Guidance teachers?

MISS STEWART: Yes, sir.

THE COURT: All right.

[10] MISS STEWART: In response to Plaintiffs' Request For Admissions Number 5, Appendix E(5), there is a chart which sets out the number of guidance teachers by race, certification, experience in the district, and total amount of experience, and salary, from 1969 through 1970.

The defendants have admitted these figures to be true and I would like that to go in.

THE COURT: Madam Clerk, will you locate that in the file?

MR. ROBERTSHAW: May I go to the podium and see what counsel refers to?

THE COURT: Suppose we take about a fifteen minute recess here and let both of you go through these matters and see what you can come up with in the way of documents, and whatever they are, lift them out of the record and make separate copies of them for the Court's guidance.

MR. ROBERTSHAW: I believe this is the only one that we have any problem with here. Is that correct?

MISS STEWART: We don't have any problem.

MR. ROBERTSHAW: [11] We don't have any problem, but is this the only one that you are interested in getting in the record?

MISS STEWART: Statistical information.

THE COURT: Is that correct?

MISS STEWART: Yes, sir.

THE COURT: All right, then if you don't mind let the Court Crier have your file and show him the exhibit there that you want to place in the record.

Mr. Crier, take that to the Xerox machine and make up three or four copies of it.

(Document photographed by the Court Crier.)

Let it be received as another stipulated item. I believe that will be the fifth. We have four.

THE CLERK: Yes, sir.

THE COURT: Let it be given Number 5.

(Stipulated Exhibit No. 5 received into evidence.)

All right, are you ready to proceed now, Miss Stewart?

MISS STEWART: [12] Yes, sir, we are ready to proceed.

THE COURT: Call your first witness.

Is the Rule invoked?

MR. BANKS: Yes, Your Honor.

THE COURT: All witnesses who are going to testify, except the parties in the case, may withdraw. While one of the plaintiffs is testifying the other withdraw, until one plaintiff has finished her testimony

(Whereupon, the witnesses withdrew.)

MR. ROBERTSHAW: If the Court please, we would like to have as a representative the President of the Board of Trustees and the Principal both, who are parties.

THE COURT: Yes, sir. Well, of course, the parties to the lawsuit have a right to remain in the courtroom until the defendants start placing on their testimony. If they are defendants to the suit they have a right to remain in the courtroom while plaintiffs are putting on their testimony.

All right, the parties to this suit, so I will know who you are, come right up here and have a seat, if [13] you will. If you are a party defendant in the case, come up and have a seat up here by your counsel.

(Parties defendant coming forward.)

Now, of course, unless you are a named party you are not entitled to sit there. You have to be a named party, representatives of the school district.

Teachers who are not named defendants would be under the rule.

MR. ROBERTSHAW: Would the Court indulge me a minute?

THE COURT: Yes, sir.

(Mr. Robertshaw conferring with counsel for the plaintiffs off the record.)

MR. ROBERTSHAW: These are all named parties.

THE COURT: You may proceed.

MR. ROBERTSHAW: Now, we have some witnesses that need to be placed under the Rule.

THE COURT: All right. Go with the Marshal to the witness room.

(Witnesses withdrawing from the courtroom.)

[14] You may proceed.

MR. BANKS: We call James Leach as an adverse witness.

THE COURT: All right, come around, Mr. Leach, as an adverse witness.

AND THEREUPON:

JAMES S. LEACH,

called as an adverse witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

CROSS-EXAMINATION

BY MR. BANKS:

Q Would you state your full name, Mr. Leach?
A James S. Leach.
Q How are you employed?
A Principal of Glen Allan High School.
Q Where do you live, sir?
A Glen Allan, Mississippi.
Q How long have you been employed as Principal of Glen Allan High School?
A I am in my eighth year.
Q Your eighth year?
A Eighth year.
Q When was your first year?
A This is my fifth year. I'm sorry. I have been in [15] the district eight years. This is my fifth year as Principal.
Q Were you Principal in '70-71?
A Yes, sir.

Q 1970-71?
A Yes, sir.
BY THE COURT: When was your first year as Principal?
A '70 and '71.
THE COURT: All right, thank you, sir.
BY MR. BANKS: That was your first year?
A Yes, sir.
Q And Mrs. Bessie Givhan taught there under you?
A Yes, sir.
Q Did you recommend Mrs. Givhan for employment for the year '71-72?
A No, sir.
Q Did you state in a letter to the Superintendent, Mr. Morris, that your reasons for not recommending Mrs. Givhan were that she was hostile to the administration?
A Yes, sir.
Q Did you state any other reasons?
A I stated that she was antagonistic toward the administration, which included other administrators there [16] other than myself.
Q What other administrators did you have in mind?
A The Counselor, Mrs. Hodges. She was antagonistic toward her during the year. And refusal to give an achievement test.
Q Those were your sole reasons for not recommending her?
A Those are mostly the reasons.
Q Now, the administrators that you are talking about are yourself and Mrs. Hodges that she was antagonistic toward?
A Yes, sir.
Q How did she manifest antagonism toward you?
A She made unreasonable demands. And she would come in the office after I would pass out memorandums, and she would come in, in an insulting and derogatory

method and attitude and state, "That I received your little memorandum", and throw it on my desk and state that she didn't intend to cooperate about various things, and make demands that we do certain things that at the time maybe were unreasonable, and I felt like I could not do.

Q Like what? Name one demand she made that you couldn't do?

A Okay. She made a demand that we put in N.Y.C. workers in office work, in which they were not hired, and I could not put them in there. They were not qualified for that [17] type work.

Q The complaint was that you were not placing black N.Y.C. workers in the same manner as you were placing white N.Y.C. workers?

A I didn't have any white N.Y.C. workers.

Q Were there any white N.Y.C. workers in the district?

A In the district?

Q In the school district?

A I don't know about the district. Glen Allan is all I know about.

Q Where were you assigning your N.Y.C. workers to?

A They were assigned to do janitorial-type work.

Q Were any N.Y.C. workers assigned to do office-type work?

A Not at that time.

Q What other demands did she make on you that you could not follow?

A She demanded that we place black people to take up tickets in the cafeteria in which the cafeteria supervisor had placed a white person to take up tickets.

Q What was the race of the cafeteria supervisor?

A Black.

Q The cafeteria supervisor was black?

A Yes, sir.

Q Who was the luncheon manager?

[18] A The cafeteria supervisor was white. The lunchroom manager was black.

Q What were the duties of the cafeteria supervisor and what were the duties of the lunchroom manager?

A The lunchroom manager was the manager over the lunchroom, the duties carried out in the lunchroom. The supervisor was supervisor over all the cafeterias.

Q For the whole district?

A For the whole district.

Q Or for that school?

A The whole district.

Q And the cafeteria supervisor was the one who assigned the persons to pick up tickets?

A At the request of the lunchroom manager.

Q What other unreasonable demands did she make on you?

A There were not so many demands. Most of the demands that came through were—she would have a list of them and I would refer them up to the Superintendent. It was mostly the arrogance and antagonistic and hostile relationship that existed that were the main things involved.

Q Those were the main things between you and Mrs. Givhan?

A And others.

Q What others?

[19] A The antagonistic attitude.

Q How was that antagonistic attitude manifested?

A It was manifested toward Mrs. Hodges, the Counselor, many times. When they would get through arguing among themselves and fussing at each other and belittling each other.

Q Where did this take [illegible]?

A It would take place in the faculty meetings, some times, and on a few occasions maybe in the office. Maybe in the hall.

Q What did they argue about?
A Just anything and everything.
Q Are you saying you didn't recommend Mrs. Givhan for employment because she didn't get along with Mrs. Hodges?
A That was one of the reasons. When I said I didn't recommend her because she was antagonistic toward the administration, I included Mrs. Hodges.
Q You said Mrs. Givhan refused to administer an achievement test?
A Yes, sir.
Q Do you know whether or not she actually administered the test, of your own knowledge?
A I can tell you what I know about it.
Q Who gave the test?
A Mrs. Hodges.
Q Were you there when the test was given?
[20] A I wasn't in the room when it was given but I walked up and down the hall.
Q When was this test given?
THE WITNESS: May I locate that date?
THE COURT: Yes, you may.
A I cannot locate that date.

BY MR. BANKS:

Q Is there a letter there to Mrs. Givhan?
A I have a letter to Mr. Morris, the Superintendent at that time.
Q You have a copy of the letter in your file that you had written to Mr. Morris, the Superintendent?
A Yes, sir.
Q This is the letter relating to the Superintendent that Mrs. Givhan refused to give the test?
A Yes.
Q Where and how had Mrs. Givhan refused to give the test?
A In a faculty meeting prior to this.

Q What, exactly, did Mrs. Givhan say?
A She just said she would not give the test.
Q Who did she say it to?
A To Mrs. Hodges.
[21] Q Were you present?
A Yes.
Q Did you hear her say it?
A Yes.
Q What did Mrs. Givhan say?
A She said she didn't intend to give the test.
Q And you wrote a letter to Superintendent Morris as a result of that?
A I did later on. When Mrs. Hodges came back and told me again that after talking with her again that she still refused, I asked her to go talk with Mrs. Givhan and check with her again, and she did. And she came back and said "Mrs. Givhan still says she will not give the test".
Q What kind of test was it?
A It was an achievement test.
Q Was the test given throughout the district?
A I am satisfied it was.
Q You don't know?
A I am not positive.
Q Who ordered the test be given?
A The Central Office.

BY THE COURT:

Q Was it given to all the grades in your school or to certain grades?
A Various tests are given to certain grades, and I [22] do not recall at this time just exactly what grades it was given to. I would have to check it out.
Q Did your directions come from the Central Office to give the test?
A Yes, sir, we got our directions from the Central Office on what tests to give.
THE COURT: All right.

BY MR. BANKS:

Q Who gave Mrs. Givhan the test?
A Mrs. Hodges.

BY THE COURT:

Q Is Mrs. Hodges a white or a black person?
A Mrs. Hodges is black.

BY MR. BANKS:

Q Do you know the purpose for giving the test?
A I would state the purpose of giving achievement tests is to see—

Q Do you know the purpose for giving this particular test at this particular time?

MR. ROBERTSHAW: If it please the Court, could the witness be permitted to finish his answer to the question, please?

THE COURT: Yes, sir. Before you ask another question permit [23] him to finish the answer to the previous question, then you can proceed.

MR. BANKS: I am sorry, Your Honor.

THE COURT: Just don't interrupt him too quick. Sometimes the exchange of questions and answers are too quickly made and it doesn't give the witness an opportunity to really answer the question.

MR. BANKS: I will withdraw that question, Your Honor.

THE COURT: It is already in the record. It doesn't make any difference. Just go right ahead and ask your next question, but just remember that.

MR. BANKS: Yes, sir.

Q The question is: Do you know the reason for giving this particular test at this particular time at your school?

A We gave the test at this particular time because we give certain achievement tests every year. The District Office states when to give them. And we want to see what the progress of the students has been.

Q And what time were you about to give this test; when was this test scheduled to be given?
[24] A I could not find that date a while ago.

BY THE COURT:

Q Do you know what time of the year they are usually given, whether it is at the beginning of the school year, the middle of the school year or the end of the school year?

A Some of the tests are given in the fall after school has been going on three or four months. Some are given over in the spring at different times.

THE COURT: All right.

BY MR. BANKS:

Q Do you know whether or not tests were given in 1969-70 in the fall?
A 1969-70?
Q Yes, sir.
A I was not Principal there in '69.

BY THE COURT:

Q You were Principal in '70-71, is that correct?
A If I don't have my dates completely confused, I was Principal there beginning in 1970.
Q But do you know of your own knowledge, if you were connected with the school system in any capacity, whether or not these tests were given?
A No, I do not know if that test was given in 1969.

[25] BY MR. BANKS:

Q Do you know whether or not it was given in the fall of 1971?
A I do not know if that same one was given then.
Q Do you know if any test was given in the fall of 1971?
A I assume that it was.

Q Do you know; do you recall?
A I cannot specifically state that there was one given in the fall of 1971.
Q Did you recommend Mrs. Hodges for the year 1971-72?
A 1971-72?
Q Yes.
A For that year or the end of that year?
Q For that year.
A She was recommended back for the 1971-72 year.
Q Did you recommend her for '72-73?
A In '72-73 Mrs. Hodges—I believe that was the year she was not recommended back.
Q At what point in time did you decide not to recommend Mrs. Hodges?
A When I finally made my mind up would have been in the spring of 1973.
Q '73?
A I believe that is the year, if I don't have my [26] dates wrong.
Q Would '72 be the correct year?
A '72, I believe would be correct.
Q When you sent out your regular intent slips, did you send one to Mrs. Hodges?
A Would you repeat that?
Q When you sent out your regular intent slips for that year asking the teachers whether they intended to be back, did you send one to Mrs. Hodges?
A I do not specifically recall. We sent them to all teachers and Mrs. Hodges might not have gotten one since she was in administration.
Q After '72-73 you did not have a full time Counselor at your school, did you?
A No, sir.
Q What if any disruptions were caused by Mrs. Givhan's attitude toward you?
A She made my work harder.

Q How?
A By keeping me antagonized all the time and putting demands on me that I simply and honestly felt I could not do, and being hostile to me in front of students.
Q The demands made upon you to hire more blacks in the lunchroom and to assign black N.Y.C. students to office work were the ones that you could not fulfill, is that correct?
[27] A That was some of those demands. But it was her methods and hostility and antagonistic attitude more so than the demands.

BY THE COURT:

Q What was Mrs. Givhan's connection with the school, what did she do; was she a classroom teacher or did she have an assignment to an administrative post?
A Mrs. Givhan was a classroom teacher, a Junior High English teacher.
THE COURT: All right.

BY MR. BANKS:

Q What did Mrs. Givhan teach?
A Mrs. Givhan taught English, Junior High English.
Q Other than the achievement test that you spoke of earlier, did Mrs. Givhan fail to follow any other instructions?
A Only to the point that she would be arrogant about things and hostile. Anything else that I know of, she followed.
Q She followed your instructions?
A I think she followed her instructions.
Q And you agreed that she was a competent teacher?
A I said all along that Mrs. Givhan was a competent teacher, if that is what she would have done instead of trying to run the school.
MR. BANKS: [28] Indulge me a moment, Your Honor?

THE COURT: Yes, sir.

(Counsel for plaintiffs conferring off the record.)

BY MR. BANKS:

Q What reason did you have for not recommending Mrs. Hodges for the year 1972-73?

A The reasons on Mrs. Hodges that I did not recommend her, mostly her emotionalism.

Q How was that manifested?

A Mrs. Hodges manifested to me at all times to be in a high state of emotionalism by coming into the office with problems and be crying—and it would turn into crying. She seemed to have problems at home that I would listen to, some time for an hour or two at a time. She would finally end up crying. She would have problems with Mrs. Givhan, and she would be highly nervous and upset about that.

Q Mrs. Givhan was gone in 1971-72, was she not?

A Yes, sir.

Q Mrs. Hodges had no problems with Mrs. Givhan during that year?

A She had had problems with her and that was still in my mind, to be carried on. But she was highly emotional, and would come into the office with other things. And that was just one of them.

[29] Q So, part of your reason for not recommending Mrs. Hodges for 1972-73 was the conflict that she had had with Mrs. Givhan during '70-71?

A No, sir. I was giving that as an example.

Q But that was still in your mind?

A Yes, sir.

Q Was that the sole reason for not recommending Mrs. Hodges?

A That was one of the main reasons for not recommending Mrs. Hodges.

Q You had been told, had you not, that you would not have a full time Counselor for Glen Allan for that fall year?

A I had not been told I would not have a full time Counselor. I did not recommend Mrs. Hodges back. I did not know what we would have.

Q You did not know what you would have?

A I did not know what type Counselor we would have. The Central Office would handle that.

Q Did Central Office ask you to recommend a Counselor for that year?

A I do not recommend Counselors.

Q Was Mrs. Hodges a Counselor?

A Yes.

Q Was she a Counselor in 1971-72?

[30] A Yes.

Q Did you recommend her?

A I did not recommend her back. I mean, I do not recommend hiring new Counselors when they come in.

Q You do recommend Counselors back for your school?

A Yes, sir.

Q Did you recommend any Counselor to replace Mrs. Hodges for the year '72-73?

A No, sir.

MR. BANKS: I have nothing further, Your Honor.

THE COURT: All right. Do you want to examine the witness at this time?

MR. ROBERTSHAW: If I may, just to clarify some things.

THE COURT: All right. You may reserve the right, if you want to.

MR. ROBERTSHAW: I understand.

THE COURT: Or you may question him at this time.

MR. ROBERTSHAW: I understand that. I think it would be better to [31] examine him at this time.
THE COURT: All right.

(Documents handed to the Court and the witness.)

Hand one to the Clerk. Let this be marked.
MR. ROBERTSHAW: I wanted to get the witness to identify it first, if the Court please.
THE COURT: All right.

DIRECT EXAMINATION

BY MR. ROBERTSHAW:

Q Mr. Leach, do you identify the letter that you have in your hand?
A Yes, sir.
Q Is that the letter with respect to which you were testifying earlier?
A Yes, sir.
MR. ROBERTSHAW: We offer that as Exhibit 6, if the Court please.
THE COURT: Let it be received.
THE CLERK: Do you want this marked as a stipulated exhibit?
THE COURT: [32] Are you going to start a new sequence?
THE CLERK: If it is your exhibit, I am going to mark it Defendants. No. 1.
MR. ROBERTSHAW: All right, Number 1.

(Document marked Defendants' Exhibit No. 1 for identification.)

THE COURT: Let me take a look at it. Let me have an opportunity to read it, Mr. Robertshaw, if you will.
MR. ROBERTSHAW: Yes, sir.

(Defendants' Exhibit No. 1 for identification read by the Court.)

THE COURT: All right, you may proceed.

BY MR. ROBERTSHAW:

Q Have you had an opportunity to refresh your memory by reading that letter?
A Yes, sir.
Q So, when was it that the achievement test was given in 1970?
A November the 30th, according to the date on this letter.
[33] Q All right, sir. And this letter was written at that time, December 1st, correct?
A Yes, sir.
Q Mr. Leach, would you please tell the Court the circumstances under which you were sent down to Glen Allan as Principal?
A Yes, sir. I was a social studies teacher and coach at Riverside, which is in the same district, The Western Line District. And after school had been going on there for, I forget exactly how long, four or five weeks or something, I was approached by Mr. Morris, the Superintendent and the Board of Trustees and asked would I be interested or willing to take on the principalship at Glen Allan.
Q All right, sir. That was in the fall of 1970?
A Yes, sir.
Q And you did take on the job?
A Yes, sir.
Q What were the conditions you found when you went down to Glen Allan?
A I was advised before I went to Glen Allan that conditions were bad, and that they were trying to—since one or two people were down there were trying to establish order until they could find a principal, and it was getting worse every day.
And when I did report for duty, or for the job, [34] the students were more or less walking the halls, the

teachers were not properly staying in their classrooms to teach, and there appeared to be a hostile attitude between maybe—between the blacks and the whites.

And now and then there would be groups of older students kind of getting in gangs in the halls and it would be hard to break them up. And there were threats made by students. And there was a lack of cooperation, it seemed like, among the teachers to help.

Q Was there a Principal there when you reported?

A There was an Elementary Principal at Glen Allan when I reported.

Q All right, sir. Now, it is in the record of this proceeding that the student population at Glen Allan at that time was 432 black and 45 white pupils. Does that agree with your recollection?

A Yes, sir, that would be reasonable.

BY THE COURT:

Q Was that formerly an all-black school before the decree of the Court providing for the desegregation of the schools?

A Yes, sir, it had at one time been an all-white school, then it became an all-black school, and then it became an integrated school.

Q I see. All right. But it was an all-black school [35] before the integration?

A Yes, sir.

THE COURT: All right.

BY MR. ROBERTSHAW:

Q And at the time there were 21 black teachers and 6 white teachers. Does that agree with your recollection?

A Yes, sir, I would think so.

Q Okay. Now, did you have any contact with Mrs. Givhan shortly after you arrived?

A Yes, sir.

Q What was that contact?

A In our first faculty meeting shortly after I arrived there was a lot of antagonism. I was trying to establish my relationship with the school and asking for cooperation among the teachers, trying to spell out what we would have to do to get the school in order and get it back running like a school properly should be running.

And Mrs. Givhan was hostile to me and inferred that she didn't intend to cooperate very much.

Q Did you later have a private conference with her?

A Yes, sir. I decided I would have to talk to her, and I talked to her in the office and asked for her cooperation. And she said that she didn't intend to cooperate.

Q All right, sir, did she make any remarks with [36] reference to Western Line School District?

A She said she didn't like Western Line District. She didn't like Morris, who was the Superintendent, or anything connected with the system.

Q All right, sir, how often did you have faculty meetings?

A We didn't have a set date for faculty meetings. But I would say we would average maybe one a month and sometimes more than that when they were needed.

Q All right, in the interim how did you distribute information to teachers and communicate policies to them?

A I sent out memoranda sometimes instead of calling faculty meetings.

Q All right, were those the memoranda about which you testified earlier?

A Yes, sir.

Q Do you recall a memorandum dealing with a six-week's test?

A Yes, sir.

Q Did you have a conversation with Mrs. Givhan with reference to that memorandum?

A Yes. I sent a memorandum out as usual advising of the schedule for six-week's tests. Like the test would be on Thursday and Friday, I would send a memorandum out a few days before that, and report cards would go out on the following [37] Wednesday. That was standard, as I understood it, throughout the District. And the Central Office stated the policies to the principals to do that.

And I was walking from the office to the lounge, which is next door, classes were changing, and Mrs. Givhan walked up to me and said she had received my little memorandum, as she always referred to them. "I have your little memorandum". And right in front of the students and all, said, "What do you expect me to do, give a pop test"? And I said, "No, ma'am, I am just giving you instructions and all the other teachers about the dates of the test and when report cards go out".

Q What sort of test was it?

A It was a six-week's test.

Q Was there any remark from Mrs. Givhan about whether she had time to prepare for such a test?

A She said, "I do not have time to prepare for it". That is what I meant to say before I said she said, "I will just give a pop test."

I said, "Mrs. Givhan, you are the teacher, you give what type test you want to give". She said, "In other words, you want me to give a pop test"? I said, "No".

This was in front of the students. They were gathering, looking. I said, "You are the teacher, you give what type test you feel it necessary to give".

[38] Q All right, sir. Now, based upon your associations with Mrs. Givhan, did you form any opinion as to whether the school could be successfully or unsuccessfully run with her present?

A When I was deciding on teachers for the following year and had to inform the Superintendent, who in turn would inform the Board, I decided that due to her antagonism and the problems that I had had with her all year long, it would be impossible for me to carry on a successful school at Glen Allan the following year with her there.

I had decided that if she were there I couldn't be there and carry out the duties, and I was placed there and I intended to do my job, and I felt like I could not do it with Mrs. Givhan there.

Q Who was hired to replace Mrs. Givhan?

A Mrs. Claudia Holmes.

Q What is her race?

A Black.

MR. ROBERTSHAW: I have no further questions.

THE COURT: Is there any recross?

MR. BANKS: Yes, sir.

RECROSS-EXAMINATION

[39] BY MR. BANKS:

Q Mr. Leach, when was it Mrs. Givhan told you she didn't like Morris, or Western Line, or anybody else?

A The first time that I heard her say that was when I talked to her in the office.

Q When was that?

A I cannot give you a date. That was shortly after I arrived at Glen Allan.

Q You arrived in September of 1970?

A Most probably toward the end of September. It was in the early fall.

Q Is Glen Allan a one through twelve school?

A Yes.

Q Was anybody present when Mrs. Givhan made this statement?

A Not when she made the statement in my office.

Q When did you pass out the memorandum regarding the six-week's test?

A You mean what date?

Q What date? Do you have a copy of that memorandum?
A No, I don't.
Q Do you recall the date of the memorandum?
A No, I don't.
Q Do you recall the date when the test was to be given?
[40] A I don't recall the date. It was probably on a Thursday and Friday of that week.
Q A Thursday and Friday of the week?
A Probably.
Q And the memorandum was passed out on Monday or Tuesday of the week?
A Possibly was.

BY THE COURT:

Q That was at the end of that six-week period, the six-week's test would indicate it was?
A Yes, sir.
THE WITNESS: May I add one other statement?
THE COURT: Yes, sir.
THE WITNESS: The six-week tests are routinely given at the same time all the time, and the teachers have a copy of the school calendar stating when tests are to be given. And also when the end of the six-weeks is coming up, they know when it is. The memorandum was a reminder.
THE COURT: All right.
MR. BANKS: No further questions.
[41] THE COURT: All right. All right, you may step down.

(The witness resumed his seat at counsel table.)

Call your next witness.
MR. BANKS: Your Honor, we call Mrs. Hodges.
THE COURT: All right.

AND THEREUPON,

DOLLYE W. HODGES,

called as a witness in her own behalf, being first duly sworn, testified as follows:

(Whereupon, Mrs. Bessie B. Givhan withdrew from the courtroom.)

DIRECT EXAMINATION

BY MR. BANKS:

Q State your full name, Mrs. Hodges.
A Dollye White Hodges.
Q Where do you live?
A 115 South Delta, Greenville, Mississippi.
Q How are you employed?
A I am employed as a teacher.

BY THE COURT:

Q Where?
A Nugent (Phonetic) Center, Bolivar County Schools.

[42] BY MR. BANKS:

Q How long have you been employed by the Nugent Center, Bolivar County?
A Two years.
Q Is that 1973-74 and '74-75?
A Yes, sir.
Q In 1972-73 were you employed?
A No, sir. I did substitute work.
Q Where did you substitute?
A Nugent Center. And Greenville, whenever I was called. Just from one place to the other; wherever I was called.
Q Do you know how many days you substituted during that school year and how much money you earned?

A I substituted about four months, and I earned about $1,600.

Q Where were you employed? Was that your only employment during that year, as a substitute teacher?

A That was my only employment during that year, until during the summer, when I worked at McRae's during the summer.

Q The summer of 1973?

A The summer of 1973.

Q Were you employed during the school year 1971-72?

A Yes, sir.

[43] Q Where were you employed?

A I was employed at Glen Allan High School as a Guidance Counselor.

Q How long had you been employed at Glen Allan?

A I had been employed as a Counselor for three years, and as a fifth grade teacher for three years and eight months.

Q All at Glen Allan?

A All at Glen Allan.

Q In 1971-72 what degrees did you hold?

A I held a BS Degree and an ME Degree, a Master of Education Degree.

Q What was your certificate classification?

A Guidance Counselor.

Q Double A?

A Double A certificate.

Q In the spring of 1972 were you informed that you would not be reemployed for the year 1972-73?

A Yes, I was.

Q Who informed you?

A The first person that informed me was Mr. Leach. And he informed me indirectly, because I asked him. There had been a fight, and Mr. Leach was out some place, so when the fight came up they brought the children to me instead of Mr. Leach. I had to go into his office. I sent one child to one office and one to another one. As

I went behind his desk to [44] sit to talk to the child until Mr. Givhan could get there, I saw the recommendation on his desk that I would not be recommended for the next year.

So when he came in that afternoon I asked him, I said, "There is rumor that I won't be recommended for the next year". He said, "We were in the process of working on it. The Superintendent will be down to talk with you about it tomorrow, or he will be down to see you soon about it." That is how I found out I wasn't going to be recommended.

Q And did you discuss your recommendation or non-recommendation with Mr. Leach at that time?

A Yes, sir. I asked him what had happened and why I was not going to be recommended. Mr. Leach and I had always worked very closely together. Mr. Leach came there at a problem time. When he came there he found me as Counselor. He came out of a social science study class. I had already had thirty hours above a B.S. Degree. I had already had thirty hours above a B.S. Degree and nine hours in Administration when he got there. So a lot of his administrative work I did because I had had principalship, I had had administration and supervision. So many of his problems, he brought them directly to me. I did the scheduling. If there was a schedule to be dropped, I dropped it. Mr. Leach and I conversed about it but I usually was the one who dropped it because he would say, "You go on and do this, Mrs. Hodges, because you know more about this than I do."

[45] Q Do you know when that was?

A On or about the 8th of March.

Q Did you ask him why he was not recommending you?

A The first thing he said was, "Well, Mrs. Hodges, to tell you the truth, I can't get a teacher to say anything about you." Then we talked along and finally he said, "Well, I will tell you, you made the parents angry. They

are angry with you." I said, "What about, Mr. Leach"? I said, "I know I told them they needed a special education class here", and I have proof to show that they do. I said, "I also told them in the meeting that this had nothing to do with insanity, but it meant grouping the children in small groups where they could best learn."

He said, "Oh, well, I can't get a teacher to say anything about you either". He said, "Well, you don't get along with the students well". I said, "What students?" I said, "I know there are some that don't particularly like my teaching ways", but I said, "there are others that come in all the time. I am always busy."

We talked about it, and finally he said, "Well, Mrs. Hodges, I will just tell you, I've got to let you go", he said, and he gave me no reason. He said, "The Superintendent will be down to talk to you tomorrow and we will discuss it then". And he never actually gave me a reason.

And he continued to talk, and he would say, "Well, [46] you know, sometimes you make the children angry", but he actually didn't pinpoint any specific reason.

Q Did he say anything with regard to his hands being tied?

A Yes, he said that. He said this later, though, not the same day. The next day when I sent someone to talk to him he said it was out of his hands.

BY THE COURT:

Q Now, were you there when this talking was done?
A No, sir.

THE COURT: Well, then, you couldn't talk about what he said to someone else unless you were there.

THE WITNESS: I wasn't there.

THE COURT: Then that would be hearsay testimony.

THE WITNESS: I didn't hear that.

THE COURT: All right.

BY MR. BANKS:

Q Did you speak to the Superintendent about it?

A Yes, sir, the next day, the following or maybe two days later. It was about the 10th of March, the Superin- [47] tendent came down, and he came in and I asked him in, and he took a seat. I might have been the one who said, "I understand I am not being recommended for the next year". And at first he said, "Mrs. Hodges, no, Mr. Leach is not going to recommend you for next year". And he continued to talk, and I asked him why. I asked him the same questions that I had asked Mr. Leach. Mr. Adams told me—at that time he was the Superintendent—he told me, he said, "Mrs. Hodges, you made the parents mad with you". He said,—

MR. ROBERTSHAW: If the Court please, we object and move to strike the testimony as to what someone else told her unless there is a prior showing that the defendant was present.

THE COURT: I believe she said she was talking about another conversation she had with Mr. Adams herself.

BY MR. ROBERTSHAW:

Q Mr. Adams?
A Yes, sir.

MR. ROBERTSHAW: Then I will withdraw the objection.

THE COURT: He was the Assistant Superintendent, as I understand it.

MR. ROBERTSHAW: [48] Yes, sir.

BY THE COURT:

Q You didn't talk to Mr. Morris?
A No, sir, I was talking to Mr. Adams.
Q Mr. Morris was the Superintendent at that time?
A Yes, sir.
Q And Mr. Adams was the Assistant Superintendent?
A Yes, sir.

Q And this conversation was with Mr. Adams?
A Yes, sir.
Q And you had the conversation with him?
A Yes, sir.
Q Yourself?
A Yes, sir, in my office.
THE COURT: All right.
A He said, "Mrs. Hodges, you made the parents angry. We just have to let you go." I said, "Mr. Adams, what did I say to the parents?" I said, "There was only one meeting". And I did repeat it about the special education incident, and the next year they brought in special education. I repeated that. And then Mr. Adams did not give me a specific reason for letting me go. He went on to say, "Mrs. Hodges, if you will resign I will give you a good recommendation". He says, "I will be in Personnel and any recommendation will [49] come across my desk. If you will resign I will give you a good recommendation to be hired somewhere else." And then he said, "If A. T. has a place for you, we will hire you there."

BY MR. BANKS:

Q Who is A.T.?

A A. T. is Mr. A. T. Williams, who is Principal of O'Bannon School, which is in Western Line.

Q Who was present when this statement was made if anyone?

A Mr. Leach was present. Mr. Leach and Mr. Adams came in to talk to me. And then he stopped talking.

Q Would this have been on March the 9th?

A This, I believe, was March the 10th. He stopped talking about why he could not hire me, his reason for not hiring me. And then he began to praise my work. He said, "Mrs. Hodges, I know that you can do it."

Q When you say "He", are you referring to Mr. Leach or Mr. Adams?

A I am referring to Mr. Adams. He says, "I know you are good and I know you know your work, and you can do your work". And he praised me, and finally he stopped. He says, "I know you are wondering if I am giving you all of these praises why I am not hiring you for the next year", he said, "but Mr. Leach can't recommend you for the next year." And he asked me to write him a letter of resignation, and he [50] wanted to take it to the Board, to present it to the Board during the next Board meeting.

Q Did you write a letter of resignation?

A I wrote the letter of resignation, and then I got to thinking, I said, "Now, I have given six and a half years here and I have done everything that I have been told to do and more, so I don't feel I could resign and I don't know the reason for resigning".

So I went by to see an attorney and I asked him. I told him the circumstances, and he said to me, "Mrs. Hodges, I wouldn't like to see you resign". I went back and tore the letter up and did not give them the letter. But after I did not give them the letter for about two weeks, each morning Mr. Leach would come to my door and he would say, "Mrs. Hodges, what about that letter of resignation"? And I said, "I don't have it".

Mr. Adams, when he would come down, would come to the door, and he would say, "Hi, Dollye", as if to antagonize me. He would step to the door and say "Hi, Dollye", and usually turn and go out. Finally, after about two or three weeks of this Mr. Leach walked into the room one day and he said, "Good morning, Mrs. Hodges. What about that letter of resignation?" And I said, "Mr. Leach, I don't have a letter of resignation?" I am not going to write a letter of resignation. You can tell the Superintendent I [51] am not going to write it. And while you are at it you can ask the Superintendent", I said, "to stop walking in my door and antagonizing me every time he comes in. He knows he is not interested in me, and please do not walk

to the door and antagonize me; that I am a human and you are pushing me against the wall."

Q Mrs. Hodges, you heard Mr. Leach testify that you displayed emotional stres in his office. Do you recall any such incidents?

A I recall only one, and that is the day he told me he would not hire me. I cried that day. And even at the end of the year when Mr. Leach came in and told me I could go home a day earlier, he said, "Mrs. Hodges, I don't know how you can stand it". He said, "You are a good one", he said, "I don't know how you stand it". And I said to him, I said, "Mr. Leach, I am bigger than you, because from March when I was told that I had to do all of the work", and I continued to do the work as I was told, but there was a coolness. And I said, "This pressure of coming by speaking, when you are saying"—for instance, his work was still coming to me, I was still doing it. If something came in for eligibility for football, or something, he still sent the work to me. This really was not my work. But he said, "Mrs. Hodges, I want you to do it because you know what to do and it would be done right if you do it", so I continued to do it.

[52] Q All right, Mrs. Hodges, you mentioned earlier that Mr. Adams said if A. T. had a position for you that you could apply for that. Did you apply for a position?

A I went up to Mr. Williams and I talked to Mr. Williams. Mr. Williams said that he had a person already in mind for that position, and that he would not be able to hire me.

Q Did a position later become available?

A I understand that it became available in September of that year.

Q That would be September of 1972?

A That was in September of 1972. I was told that the position was available, that the girl had not been hired. And I went to Mr. Morris—this is the Superintendent—and I asked him if this position was open, if he would

give me consideration, or if he would hire me. And he told me, "No, he would not hire me", and I asked him why. I said, "Why, Mr. Morris, won't you hire me; what have I done"?

He said, "In the first place, Mrs. Hodges, two years ago I came down and told you to teach fourth grade". I was High School Counselor, and I remembered. And he came down and told me to teach the fourth grade, and I said to him, "Mr. Morris, I am half sick and I am afraid I won't be able to work with the children".

Q Was that the 1969-70 school year when he asked you [53] to teach fourth grade?

A That was the year that Mr. Leach came down. It must have been '70-71.

Q '70-71?

A I said, "I don't think I will be able to work with the children". And he said, "Okay", and walked out and slammed the door. But in talking to the Principal, who was black, a black elementary principal, I said to him, I said, "Mr. Jackson, if I would take fourth grade and teach fourth grade", I said, "that is a demotion, and the court order says that we are not supposed to be demoted from our position". The black principal went back and told Mr. Morris, and Mr. Morris told me what I had said. He said, "That is one reason".

Q Did he ever discuss that with you prior to September 1972?

A No, it had never been discussed with me prior to that. He said, "The next reason is I have a letter that you have written". And I said, "What letter, Mr. Morris"? He said, "A letter that you sent to Atlanta". I said, "I don't remember sending a letter to Atlanta", but then I said, "May I see it, please"? And then he sent Mr. Adams for my folder.

He brought the folder in and he showed me the letter. I said, "Oh, Mr. Morris, I did send that letter. I tried to get Mr. Leach. I couldn't find him that day, and I was

pushed for time." I had signed his name and sent the [54] letter. Then he said, "That meant that you were unstable". And I told him that I was. I said, "Mr. Morris, I don't believe—I would not consider myself being unstable but I would consider myself at that time being under pressure and pushed for time".

Q When was this letter written?

A I wrote the letter on April the 6th. I mailed the letter on April the 6th.

Q All right, was it a letter recommending yourself?

A Yes, sir, it was a letter recommending myself. I had always signed Mr. Leach's name to different forms, and I had never signed Mr. Leach's name to my recommendations. I had signed his name to many college recommendations for students, where I sent off a recommendation.

Q Was that done with his permission and at his request?

A It was not done with his permission. I didn't sign Mr. Leach's name that day.

Q I am not talking about the letter you signed for yourself, I am talking about previous letters.

A Oh, the previous letters, yes. Mr. Leach knew I would be signing them. Many times I would hand him the recommendation and he said, "Mrs. Hodges, take this and sign it. You know more about that stuff than I do. Just write it and mail it off." And this is what I would do.

[55] BY THE COURT:

Q As I understand it you didn't have any authority to sign his name to a letter recommending yourself?

A No, sir, I did not.

Q You did that on your own?

A I did that on my own accord, and I am sorry for that.

BY MR. BANKS:

Q What were the circumstances under which you did that?

A The circumstances under which I signed this letter?

Q Yes, signed the letter recommending yourself.

A This was on Thursday. I had a meeting in Jackson on Friday. Mr. Leach either was not in school that day or he had come in and had gone out. I had to get the letter in the mail. I was leaving the following day. Usually when I have a meeting in Jackson I would drive down there that afternoon to be there for 9 o'clock the next morning.

So, I looked for Mr. Leach and I couldn't find him. I met Mr. Givhan in the hallway, and I said to Mr. Givhan, "Mr. Givhan, will you sign this for me"? He says, "I am busy." He says, "I am on my way to class, get someone else to sign it for you". And I got someone to sign his name and I signed Mr. Leach's name. And I mailed the letter. I got the girl in the library, I saw her some place, to type the [56] address on it, and she typed the wrong address. The letter came back to Mr. Leach.

Q When was the letter due wherever it was supposed to be?

A It was due on the 10th, which was on a Monday. That was the deadline. It was due on Monday. And Mr. Leach got the letter. Normally when a letter comes back that I have sent Mr. Leach would come to me and he would hand it to me, and he would say, "Mrs. Hodges, do you know something about this"? And I would say, "Yes, Mr. Leach, I know about that. I sent the letter." He would say, "Well, I just wanted to know if you knew. This is all right." I had access to the letterheads and everything in the school, and I wrote letters and made phone calls at will, and it was understood.

Q Mrs. Hodges, did Mr. Leach, or Mr. Morris, or anyone say anything to you about your instability or emotional instability before September of 1972?

A Once Mr. Leach said to me in my evaluation—that is the only checkmark he had—he said, "Mrs. Hodges, you can show emotion, facial"—he said—"facial emotion when you become upset or when I say something to you that

you don't like. I can tell it through your facial expression." And I wrote on my evaluation that this is one of the things that I recognize too, and I am working on it.

Mr. Leach and I discussed that and he agreed. He [57] even came back and told me, "Mrs. Hodges, you are improving. I think you are working on it."

Q When did that happen?

A During evaluation time. I don't recall the exact date. We had two evaluations, one in the fall and one in the spring. When he did not recommend me, he had already gone through my evaluation with me. And there was nothing on my evaluation that indicated that I would not be recommended for the next year.

Q Going back to 1970-71, you were working with Mrs. Givhan, is that correct?

A Yes, sir.

Q And you heard Mr. Leach talk about a particular achievement examination that was supposed to be given?

A Yes, sir.

Q Do you know who gave that examination to Mrs. Givhan's class?

A Mrs. Givhan and Mrs. Butler gave that achievement test. Now, in the beginning Mrs. Givhan did say she was not going to give it.

Q Did she give her reason for not giving it?

A She said I was supposed to give it. She said, "Mrs. Hodges, I am not going to give that test". She said, "That is the Counselor's job". That is what she said.

The morning of the test, I had gotten up the [58] booklets and I had gotten Mrs. Butler. But that wasn't unusual because the other teachers helped other teachers, those who did not have regular classrooms. I got the material and gave it to Mrs. Butler, and I spot checked. I did not administer the test myself, but I went from room to room to dress up people and to see if they were doing it correctly.

Q Uh-huh.

A I went in. I find Mrs. Givhan and Mrs. Butler giving the test. And then when the test was finished, I told them, "When you finish the test alphabetize the tests and bring them back to me". When the test was finished Mrs. Givhan alphabetized the test booklets and answer sheets and brought them back to my office. She gave the test, but she did say in the beginning she was not going to give it.

Q You heard testimony about Mrs. Givhan exhibiting a hostile attitude toward you.

A Yes.

Q Did you have any fights with Mrs. Givhan during the year '70-71?

A I would not consider them fights. I would consider them a matter of disagreement. Mrs. Givhan, at one particular instance, wanted me to advance a student whom I felt was not capable of going into the ninth grade work. She and I had a disagreement about that, and she did bring a parent in to see me, which I welcomed, because it gave me a chance to talk to [59] the parent and go over the cumulative record and show them just how the student was progressing.

Q Other than that incident how was your working relationship with Mrs. Givhan?

A Well, Mrs. Givhan is the type of person who has her own personality, and she has a mind of her own. And I have my personality and a mind of my own. And many times we did not see eye-to-eye about things, but it wasn't to the point that we came to blows. That was the only confrontation we had, that I mentioned. Other than that, I just considered her too outspoken and she considered me the same. And this is the kind of relationship we had.

When she left to go somewhere, to the library or something, many times she would ask me, "Mrs. Hodges, would you go to help me select books"? So, it was sort of personality clashes more than hostility.

Q But did it interfere with your working relationship?

A It did not interfere with my working relation. In fact, each time she said something contradictory to me, I think it kind of gave me a push to work a little harder.

MR. BANKS: Indulge me a moment, Your Honor.

THE COURT: Yes, sir.

(Counsel for plaintiffs conferring off the record.)

[60] MR. BANKS: We tender the witness, Your Honor.

THE COURT: Before we get into the cross-examination, I think we will take the morning break now, for fifteen minutes.

(Court in recess from 10:25 a.m. until 10:40 a.m. The trial then proceeded in open court.)

THE COURT: Be seated, please.

MR. BANKS: I have two or three more questions of Mrs. Hodges, if the Court please.

THE COURT: All right.

BY MR. BANKS:

Q Mrs. Hodges, you stated earlier you worked at the Nugent Center, Bolivar County. What is your position there?

A I am a reading teacher there.

Q Do you have a Double-A certificate in reading?

A No, sir. I am working on an A Certificate.

Q Does that require you to make less money than you would have made—

A Yes, sir.

Q —if you were in Western Line?

A Yes, sir. I make far less than what I would be [61] making in my chosen field.

Q Did you get a statement from your Superintendent—

A Yes, sir.

Q —about your wages for the year '73-74, and '74-75?

A Yes, sir.

MR. BANKS: I hand this to the Marshal to hand to the witness.

(Document tendered to and examined by Mr. Robertshaw; handed to the witness.)

Q Is that the statement you had before?

A Yes.

Q Does that show what you made for the year '73-74, and '74-75?

A Yes, sir.

MR. BANKS: Your Honor, I ask that this be admitted in evidence.

THE COURT: Let it be received.

THE CLERK: Plaintiffs' Exhibit No. 1 received into evidence.

THE COURT: Let me see it.

(Tendered to and examined by the Court.)

[62] THE COURT: All right, you may proceed.

BY MR. BANKS:

Q Do you know approximately how much you were making at Western Line as a Counselor with a Double-A certificate?

A Approximately $9,800.

Q Would that be for the year '74-75?

A That would be for the year '74-75, yes, sir.

Q How much were you making for the year 1971-72?

A I left there making $7,200.

Q Has it been raised since that time?

A Yes, sir, there has been three.

Q Do you still desire to return to Western Line as a Counselor?

A Yes, sir.

MR. BANKS: We tender the witness, Your Honor.

THE COURT: All right, you may take the witness on cross-examination.

MR. ROBERTSHAW: Thank you, Your Honor.

(Document handed to the witness by Mr. Robertshaw.)

CROSS-EXAMINATION

BY MR. ROBERTSHAW:

[63] Q Mrs. Hodges, in our Interrogatories we included a copy of that letter. Do you identify that letter as a letter attached to our Interrogatories, as Exhibit "C"?

A Yes, sir.

MR. ROBERTSHAW: May I have that marked as an exhibit?

THE COURT: Yes, you may.

THE CLERK: Defendants' Exhibit No. 2 marked for identification.

MR. ROBERTSHAW: May it be returned to the witness?

THE COURT: You can give me the copy and give the original back to the witness.

(Handed to the witness.)

MR. BANKS: Your Honor, we object to the introduction of this document and to any discussion or testimony about it. We consider it to be irrelevant and immaterial.

THE COURT: I will permit further identification on it so I can see what it is, other than it was just an exhibit attached to an Interrogatory.

MR. ROBERTSHAW: [64] Yes, sir.

Q Mrs. Hodges, you were requested to admit that that was a true copy of a letter addressed to the then Superintendent of Western Line?

A Yes, sir.

Q And the then Principal of Glen Allan Attendance Center, and signed by twenty-seven students?

A Yes, sir.

Q Correct?

A Yes, sir.

Q You were asked to admit that the letter was not solicited by any of the defendants, and you admit that, is correct?

A Yes, sir.

Q Now, you were asked to admit, quote, "That that portion of the letter reading "The Counselor we have now isn't much of a Counselor, she can't solve our problems", refers to yourself?"

A Yes, sir.

Q Does it refer to yourself?

A According to the letter they are referring to me. But as far as I was concerned when I saw the letter, it does not refer to me because this letter was written when the children were angry because Mrs. Givhan was being let out. They were emotionally—they were highly emotional. These [65] were eighth graders at the time. Most of my work had been done directly with the ninth through twelfth graders. I had not worked as closely with them as I had with the ninth through twelfth graders, and it did not arouse me at all. I felt that they were doing it through emotion and that they were angry.

Q All right. Now, you were the only Counselor at Glen Allan at the time that letter was written, is that not true?

A Yes, sir.

MR. ROBERTSHAW: We now offer that.

THE COURT: Is there an objection?

MR. BANKS: We object on the basis of hearsay and relevancy, Your Honor.

THE COURT: The objection is overruled. Let it be received.

(Defendants' Exhibit No. 2 received in evidence.)

Let me read it, now, before you proceed.
THE WITNESS: May I add something?
THE COURT: Just a moment.

[66] (Document read by the Court.)

All right, you may explain.
THE WITNESS: Counsel,—
MR. ROBERTSHAW: If you don't mind, just answer my questions as I put them to you.
THE WITNESS: Okay.
THE COURT: Well, I was going to give her an opportunity to explain it, if she wants to make a statement about it.
MR. ROBERTSHAW: All right, sir.
THE WITNESS: Counselor, that letter was written one year before I was let out. The year that that letter was written, I was recommended for work for the next year. The year that particular letter was written, I was recommended for work that particular year.
MR. ROBERTSHAW: All right.
THE COURT: You have explained it.

BY MR. ROBERTSHAW:

[67] Q Have you had an opportunity to look at the rather dim copy handed to you by the Marshal?
A Yes, sir.
Q Did you see the original of that?
A Yes, sir, I found it on my desk.
Q And it is signed, purportedly, from the seventh, eighth, ninth, tenth, and eleventh grades, and some of the twelfth?
A No, sir, I can't say that.
Q Well, you did see the original?
A Yes, sir, I saw the original, but I don't remember whom it was signed by. It was just something I found on my desk. I showed it to the Principal and didn't pay

any more attention to it. In fact, I think I gave it to him. But I don't recall who signed it.
Q Do you have any idea where the original is?
A No, sir, I don't, because I gave it to the Principal.
Q To Mr. Leach?
A Yes, sir.
MR. ROBERTSHAW: All right. We offer that as an exhibit. What number will this be?
THE CLERK: Number 2.
[68] MR. ROBERTSHAW: Here is another one.
THE CLERK: Is this another exhibit?
MR. ROBERTSHAW: Yes, ma'am.
THE CLERK: It will be Number 3.
MR. BANKS: That is hearsay and irrelevant. It is not even signed.
THE COURT: Let me read it, if I can. You say it is dim?
MR. ROBERTSHAW: Yes, sir.

(Document tendered to and examined by the Court.)

THE COURT: I can't read it.
MR. ROBERTSHAW: If the Court please, I was going to ask the witness to read it. She had the original.
THE COURT: All right, if you will.
MR. ROBERTSHAW: I believe I can make it out.
[69] THE COURT: See if you can make it out.
THE WITNESS: Judge, I tried to make it out. I couldn't make it out. I see words like "Mrs. Jackson, Mrs. Jacobs, boom". But, to read it straight through, I wouldn't be able to.
MR. ROBERTSHAW: All right. If the Court please, may I read it and have her follow me, and she can correct me if I make a mistake?
THE COURT: All right.
MR. ROBERTSHAW: (Reading) Dear Mrs. Hodges: Let me tell you one damn thing. Just because you, indistinct, you are School Counselor, don't you try to get rid

of our best teachers. If I weren't—if it weren't for you, she would not be fired. I hate you, Hodges. You frown up in your fact all of the time.

MR. BANKS: Your Honor.

MR. ROBERTSHAW: (Reading) You think—

MR. BANKS: [70] Objection. Evidently, Mrs. Hodges cannot follow several of the words that have been misread already.

THE COURT: Can you follow it?

THE WITNESS: No, sir, I am not following it word-for-word because I can't understand it word-for-word.

THE COURT: All right. Do the best you can with it.

MR. ROBERTSHAW: I will ask Counselor to correct me if I misread a word.

THE COURT: All right.

MR. BANKS: So far he has missed a word. He put in "Mrs." when there is no "Mrs.". It says, "Dear Hodges". And I believe he read "she" when it should be "they".

And he read, "If it weren't". All I can make out is an "I".

MR. ROBERTSHAW: Well, let me try to reread it.

(Reading) Let me tell you one damn thing. Just because you are School Counselor, don't you try to get rid of our best teachers. If it weren't—

[71] Do you read that "I"?

MR. BANKS: That is all I see.

MR. ROBERTSHAW: (Reading) If I weren't for you, they would not be fired. I hate you, Hodges. You frown up in your face all of the time. You, indistinct, you are young.

THE COURT: What?

MR. ROBERTSHAW: The word, I believe, is "think".

THE COURT: You think you are young?

MR. ROBERTSHAW: (Reading) You think you are young. You think you are cute. Well, let me tell you one, obscenity, thing.

THE COURT: One what?

MR. ROBERTSHAW: (Reading) One mother-fucking thing. I hope you die with a heart attack. All of the children of school want our teachers back. We demand you to let Mrs. Givhan, Mr. Givhan, Mr. Ledbetter, Mr. Jacob and Mrs. Jacob, and especially Mr. Jackson. If you don't let them come [72] back you better not come back, because if you don't get things straight pretty soon, boom for you. Ha, Ha, Ha. From the seventh, eighth, ninth, tenth, eleventh graders and some of the twelfth. You old fool. We hate you, Mrs. Hodges. Please commit suicide.

THE COURT: Are there any names signed to it?

MR. ROBERTSHAW: No, sir, it is anonymous.

THE COURT: I am going to sustain the objection to it. It has no bearing at all on my decision. And I don't think the Trustees or the officers of the school should have paid any attention to it.

MR. ROBERTSHAW: All right.

(Document produced by Mr. Robertshaw.)

BY MR. ROBERTSHAW:

Q Do you identify that as an Employee Evaluation Form dated April 16th, 1971?

A Yes, sir.

Q And on the last page, do you acknowledge a copy of the report has been given to you and discussed with you?

A Yes, sir.

Q Now, if you would please refer to the third page, [73] and the second to last item. You were rated low on stability. Is this the area that was discussed with you by Mr. Leach?

A Yes, sir.

Q And that is the area that you were to work on, is that correct?

A Yes, sir.

THE COURT: Now, you say rated low. It says here, "Occasionally 'blows up' under pressure; is easily irritated."

Is that what you mean, under "Stability"?

MR. ROBERTSHAW: Well, it is on a scale of one to five. From bad to good, it is rated two, which is what I refer to as being low, or below average.

THE COURT: Well, it speaks for itself, unless the word "Low" is on there somewhere where I can see it. But, it speaks for itself.

MR. ROBERTSHAW: Yes, sir. We would like that introduced as an exhibit.

THE COURT: All right, let it be received.

THE CLERK: Defendants' Exhibit No. 4 received into evidence.

[74] THE COURT: Regardless of what it said in the other portion of it, Mr. Leach here said that she is doing a good job as Guidance Counselor.

MR. ROBERTSHAW: That is correct, she was doing a good job during that year.

THE COURT: Now, just a moment. Let me get through talking before you start. The same thing applies between counsel and the Court as it does between counsel and the witnesses.

The Court Reporter can't get both of us talking at the same time.

MR. ROBERTSHAW: Yes, sir.

THE COURT: I was going to say that regardless of what is in the report itself, Mr. Leach did at that time consider her as doing a good job as a Guidance Counselor.

It will be received in evidence.

(Defendants' Exhibit No. 4 received in evidence.)

You may proceed.

(Document produced by Mr. Robertshaw, handed to the witness.)

[75] BY MR. ROBERTSHAW:

Q Mrs. Hodges, what are the duties of a Counselor?

A The duties of a Counselor is to work with students in personal and impersonal problems, and work along with the administration as long as it doesn't deal with discipline problems.

Q And a significant portion of your work is to advise school children with problems?

A Yes, sir. Also, you are assigned according to what the Principal assigns you to do.

Q Right. But you do advise them about problems, and advise them about work, and advise them about going to school, and you spend a good bit of time with the children?

A Yes, sir.

Q And the children you worked with primarily are eleventh and twelfth grade children?

A No, sir. The children I worked with primarily, closely, were ninth through twelfth graders.

Q Ninth through twelfth?

A Yes, sir.

Q And these children are young adults?

A Yes, sir.

Q Now, would you agree that a necessary quality for a Counselor would be unquestioned integrity?

A Yes, sir, I would agree it would be unquestionable, [76] but as a human you make mistakes.

Q Would you agree that honesty is an essential characteristic?

A I would agree that honesty is.

Q Now, in the summer of 1972 you had applied to Atlanta University for work on your doctorial, had you not?

A Yes, sir.

Q And they required a recommendation from the Principal and from the Assistant Principal, did they not?

A Yes, sir.

THE WITNESS: But, Your Honor, this was not in the summer, this was in the spring.

BY THE COURT:

Q The spring of '72?

A Yes, sir.

BY MR. ROBERTSHAW:

Q The spring of '72?

A Yes, sir.

Q And these forms were sent to you to be filled out by the Principal and the Assistant Principal, is that correct?

A Yes, sir.

Q Now, you have before you a rating blank and an envelope, and I believe you testified that you mailed that to Atlanta University.

[77] A Yes, sir.

Q And at the time you mailed it you intended that they rely on that in deciding whether or not to admit you to the summer program, did you not?

A Yes, sir.

Q And you knew that they were looking for the evaluation from the Principal and the Assistant Principal?

A Yes, sir.

Q All right. Now, turn to the back of the rating blank.

A (Examined)

Q Do you have it before you?

A I have it.

Q Did Mr. Leach write that or did you write it?

A No, sir, I have already testified I wrote it. And this is the one infallible thing in my career. I am sorry I did it, perhaps under pressure because I had a deadline to meet and because at the time I was pressured because

I was out of work and trying to get into the doctorial program.

At that time I looked for Mr. Leach. I could not find him. I did it then. But I did it under pressure. And this is the one thing I am sorry for.

Q Well, how long had you had the blank?

A I don't recall, Counselor, how long I had had the [78] blank. Because, as I said, at this time I was under pressure. I was writing all over the country trying to find work for the next year.

Q Had you asked Mr. Leach to fill out the blank?

A When it dawned on me that this was the date to mail the blank, I got it out of my office and went looking for him. I could not find him. I did this in the office. I went back looking for him to get him to sign it. Because even on some of my recommendations that he had sent in he had come to me. He would come to me and say, "Mrs. Hodges, what do you want me to put on this"?

MR. ROBERTSHAW: If the Court please, I don't believe the answer is responsive to my question.

THE COURT: Well, the objection is overruled.

BY MR. ROBERTSHAW:

Q All right, continue.

A He would ask me—

THE COURT: She has given an explanation of having done something that she admits was wrong, so far as that is concerned. She is trying to explain her actions.

MR. ROBERTSHAW: All right.

[79] A He would ask me, "What do you want me to put on this? I want to give you a good recommendation, what do you want me to write?" So, after I couldn't find him and, as I say, being under pressure as I was, I just decided to write this.

I know it was wrong, and I am sorry for it.

Q All right. Now, did you ever discuss with Mr. Leach this particular recommendation?

A I left immediately that afternoon or the following morning for Jackson. When I came back it never crossed my mind again.

Q Prior to April the 6th, did you ever or did Mr. Leach ever discuss a recommendation of this type to you?

A Yes, sir, he sent one to Alabama University for me. I gave it to him, he wrote it up, and at the same time he asked me what should he put on there, what did I want him to put on there, so that it would go in and be approved.

Q Now, my question was: Did you ever discuss this particular rating with Mr. Leach?

A No, sir, I didn't discuss the rating with him.

Q And you knew at the time you mailed this that Atlanta University would regard it as coming from Mr. Leach?

A Yes, sir. I have admitted it was wrong.

Q All right. Had you already received notice at the time that you would not be employed for the next year?

[80] A Yes, sir, I had received notice in March.

BY THE COURT:

Q And this was in April?

A April.

Q And you said a while ago you were out of work at the time.

A Well, I knew I would be out for the following year.

Q I see. The decision had already been made?

A Yes, sir.

Q By Mr. Leach and the other authorities not to recommend you?

A Yes, sir.

Q At the time of this?

A Yes, sir. They made it March the 10th.

THE COURT: All right.

MR. ROBERTSHAW: We offer that as Exhibit 4.

THE COURT: All right, let it be received into evidence.

THE CLERK: This is Exhibit No. 5.

(Defendants' Exhibit No. 5 received in evidence.)

(Document produced by Mr. Robertshaw, handed to [81] the witness.)

BY MR. ROBERTSHAW:

Q The Marshal has handed you a second Personal Rating Blank, also from Atlanta University. And I will ask you to examine that. In the blank for "Name of Applicant", can you tell me who wrote that?

A I printed that.

Q You wrote that?

A I printed that, yes, sir.

Q And the checks on the various questions, who put those checks in?

A I did that.

Q All right, is this Mr. Givhan's signature?

A No, sir, it is not.

Q Now, on April the 6th Mr. Givhan was present at the school?

A I met him in the hall. He said that—

THE COURT: Now, he just asked you if he were present.

THE WITNESS: Yes, sir.

THE COURT: Just answer his questions.

A Yes, sir.

BY MR. ROBERTSHAW:

[82] Q And you knew he was in school that day?

A Yes, sir.

Q And I believe you testified that Mr. Leach was absent that day.

A He was not there that day, yes, sir.

Q And you also mailed this one to Atlanta University?
A Yes, sir.
Q Knowing it was wrong?
A Under the same conditions, yes, sir.
Q And intending that they rely on it in acting on your application?
A Yes, sir.
THE WITNESS: May I explain this? I was given permission by Mr. Givhan. I met him in the hall, and he said he was busy, he had to go to a class. He said, "Get someone else to sign it for you", and I got someone else to sign it. This was not unusual either.
Q Did Mr. Givhan ever authorize you to sign his name?
A No, sir, not in a written form.
Q All right, when did Mr. Leach,—
THE COURT: She said he authorized her to get someone else to sign it for him.
[83] Q Is that what you testified?
A Yes, sir, I understood him to say, "I am busy, get someone else to sign it", in passing in the hall.

BY MR. ROBERTSHAW:

Q Did you tell Mr. Givhan what it was?
A No, sir, I don't remember. I don't recall telling him. I had it in my hand like this (Demonstrating) when I met him, and said, "Sign this. Read and sign this for me, Mr. Givhan". He says, "I am busy, I am going to class."
Q So that Mr. Givhan had no opportunity to read that?
A He never read it, no, sir.
Q I see. Isn't it a fact that on other documents that you testified that you signed and sent out that those were routine requests for grades?
A Some was routine requests for grades. Others was for various things. Some went out to parents for consultation. There were various things, not just for grades

only. There were other letters I sent out. I made up all of the forms in my office of different kinds and ran them off on the mimeograph machine. And many times when Mr. Leach was not there I signed his name to them and ran them off.
Q When did he authorize you to sign his name to anything?
A Mr. Leach never came up and said, "Sign my name", but he never said, "Don't sign my name". He has gotten back [84] many things that I have signed. And he would bring it to me, and he would say, "Mrs. Hodges, do you know about this?" I would say, "Yes, Mr. Leach, I wrote and signed that". He would say, "Okay. I just wanted to know if you knew about it."
Q Now, isn't it a fact that the forms that you had had a place for signature of Principal or Counselor?
A No, sir, they had a place for signature by Principal and Counselor, meaning both persons signed.
Q You never signed one that said "Principal or Counselor"?
A I might have. I don't recall.
MR. ROBERTSHAW: We have no further questions.
THE COURT: Is there anything on redirect?
MR. BANKS: No, Your Honor.
MR. ROBERTSHAW: I meant to introduce that last document into evidence.
THE COURT: All right, let it be received.
THE CLERK: Defendants' Exhibit No. 6 received into evidence.
MR. BANKS: [85] No further questions of this witness, Your Honor.
THE COURT: You may stand down. Call your next witness.

(The witness resumed her seat at counsel table.)

MR. BANKS: We call Mrs. Givhan.

AND THEREUPON,

BESSIE B. GIVHAN,

called as a witness in her own behalf, being first duly sworn, testified as follows:

DIRECT EXAMINATION

By MR. BANKS:

Q Would you state your full name, Mrs. Givhan?
A Bessie Brantley Givhan.
Q Where do you live?
A I live at 1260 Holmes Street, Greenville, Mississippi.
Q Where are you employed?
A I am employed with the Delta Resources Committee as a community worker.
Q How long have you been employed there?
A Since July 16th, I believe, 1974.
Q Where were you employed before that?
A Mississippi Delta Council for Farm Workers Opportunities, Incorporated.
[86] Q What were the dates of your employment with the Delta Council?
A Well, it was a federal program and then there was a cutback.
Q What were the dates of your employment, that you worked there?
A The date was November 3rd, 1971, and it ended May 30th, I believe.
Q May 30th, 1972?
A 1972.
Q In July 1974, where were you employed?
A Nowhere.

BY THE COURT:

Q Now, let's see. You were employed at this Delta—
A Resources.

Q —Resources since June 16, 1974?
A Yes, sir.
Q You were employed by the Delta Council from November 3rd, 1971, to May the 30th, 1972?
A Yes.
Q And you were unemployed between the two periods?
A Yes.

BY MR. BANKS:

Q Did you bring tax records with you to show your salaries?
[87] A Yes, I did.
Q For both these periods?
A Yes.
Q Are they on counsel's table?
A I think I gave them to you.
MR. BANKS: We will find them.
Q Where were you employed before November the 3rd 1971?
A I was employed by the Western Line School District.
Q How long were you employed at Western Line?
A From 1963, I believe September 1963 until May 1971, I think it was.
Q What was your assignment in that school district?
A I worked at the O'Bannon School, and I was—well, the first year I think I taught one seventh grade English class, and the rest was ninth grade English classes. And somewhere around 1965 or '66 we added speech to the curriculum, and which I taught ninth grade English and speech. The speech was from nine through twelve, and we were to teach it—
Q (Interposing) You taught speech from 1965?
A Yes, sir.
Q Were you recommended for employment for the school year 1971-72?
A No.
[88] Q Who was your Principal?
A Mr. James Leach.

Q Did Mr. Leach tell you why you were not recommended?

A No, he didn't.

Q You heard Mr. Leach testify that you exhibited an antagonistic attitude and you refused to give an exam. Did you give that achievement test?

A I did give the test.

Q With regard to the question of about N.Y.C. workers, would you explain to the Court what that involved?

A The office, as I explained to Mr. Leach, everybody in the office was white. I told them with the black school, the number of black pupils there, the impression—it didn't give the children any incentive to learn, you know, because whenever they passed the office, I told him, "When they see all white faces in the administration, it wasn't good for the atmosphere of the learning for the children".

Q The clerical staff and office staff was all white?

A All white.

Q At the Glen Allan School?

A Yes.

Q Had it been that way in 1969-70?

A I don't know. I couldn't answer that.

Q What did you request of Mr. Leach with regard to the office workers?

[89] A I gave Mr. Leach a list of things. He called them "demands". I just told him they were not demands, they were requests.

Q What did you request?

A I was requesting the office personnel—I told him they should be integrated, and that the N.Y.C. workers should be used not only to do janitorial services but also to do little office work, such as pass out absentee slips, you know, and jobs of that type.

Q Was there any request on that list regarding the operation of the lunchroom?

A I think probably. At that particular time I informed him that the—I think I used the words "choice positions"—that whites were in all choice positions.

Q What were those choice positions?

A Taking up lunch tickets in the cafeteria.

Q Were there other choice positions?

A Besides the principalship, the secretary, the head counselor was white. And I don't know whether before I asked him these requests, I think it was probably after that, that they placed a white lunchroom supervisor. And then I think I went to him and told him, I said, "Now, this is what I was talking about, you know, whites in choice positions".

Q Now, you heard Mr. Leach refer to you talking about his little memorandum. How many discussions did you [90] have with Mr. Leach about a memorandum?

A I don't recall using the expression of "little memorandum". Mr. Leach did not have faculty meetings. And the only communication that we had was through memorandums. And there were some times that he would pass out the memorandums, and I would ask him, I would say, "Mr. Leach, when will we have a faculty meeting", you know? And he says, "Well, I don't have a faculty meeting on my schedule". Because some things on the memorandum were probably needing explanation, whereas, the teachers have to, you know, pass by each other and ask, "What did he mean by this", and "What did he mean by that"?

But I thought if he would have a faculty meeting and explain to the teachers what he wanted done, you know, the job would go along smoothly.

Q What was the relationship between you and Mrs. Hodges?

A I would say our relationship was good. There were certain things I felt that Mrs. Hodges should have been doing regarding the welfare of the students.

For example, when I asked her about counseling the seventh and eighth grade students, which I was teaching English, she stated that her contract did not read that she counsel seventh and eighth grade students. This was

the majority of the students at school, was seventh and eighth [91] grade students, which were over a hundred. Those from nine through twelve were less than a hundred students.

And this is what she said, she was hired to counsel less than a hundred students. And I couldn't see the District nor Mr. Leach allowing over a hundred students in the seventh and eighth grade, which I felt needed counseling more than the high school students. And, which, this particular counseling job actually fell to me as an individual teacher and counselor.

Q You kind of filled the void for the seventh and eighth grade students?

A Yes.

Q Did that cause your working relationship with Mrs. Hodges to suffer in any way?

A No, it didn't cause it to suffer in any way.

Q Did the students suffer from any dispute between you and Mrs. Hodges?

A Not to my knowledge.

BY THE COURT:

Q Did you discuss that problem with Mr. Leach?

A About the—

Q About Mrs. Hodges performing counseling work with seventh and eighth grade students?

A No. No, I didn't.

Q You never did discuss it with him?

A No, I didn't discuss it with him.

[92] Q You just discussed it with her with reference to the work she was doing?

A Yes. He may have been present at a time that I discussed it with her. He had knowledge of this.

Q What was your working relationship with Mr. Leach?

A I would say our working relationship was good.

Q Did you ever fail to follow any of his instructions?

A Not to my knowledge.

Q Did he ever have any counseling sessions with you?

A No.

Q Mr. Leach testified that you told him you didn't like Western Line, or Mr. Morris, or anybody employed by Western Line. Do you recall such an incident?

A I can't recall that, no.

Q Did you make such a statement?

A No.

MR. BANKS: Would the Court indulge me a minute?

THE COURT: Yes, sir.

(Counsel for plaintiffs conferring off the record.)

MR. BANKS: I would like to take a few seconds to find out what happened to the W-2 forms that were here during [93] the recess.

THE COURT: Well, all right, see if you can find them there.

(Counsel for plaintiffs searching for subject W-2 forms.)

Do you want to go help them search?

THE WITNESS: Yes, sir.

(The witness assisting counsel search for records; returned to the witness stand.)

BY MR. BANKS:

Q Mrs. Givhan, I hand you a package of slips of paper stapled together and ask you whether or not you can identify them?

A (Examined)

Q What is included in that pack, Mrs. Givhan?

A What is that?

Q What is included in that pack? Is there a copy of your W-2 forms?

A All of my W-2 forms, I believe, from nineteen—

Q (Interposing) Some of those are wage statements. What do they represent, the last five or six sheets?

A It shows, starting on March the 11th, 1975, my salary was $216. The 3rd month and the 28th day of '75 shows I was making $240 every two weeks.

[94] Q Do those represent your total earnings from May of 1971 through April of 1975?

A Yes.

MR. BANKS: We move that these be admitted in evidence.

THE COURT: All right, let them be received in evidence.

(Plaintiffs' Exhibit No. 2 received in evidence.)

MR. ROBERTSHAW: May I see them, if the Court please?

THE COURT: Yes, sir.

(Tendered to and examined by Mr. Robertshaw; returned to the Clerk.)

THE COURT: All right, you may proceed.

BY MR. BANKS:

Q Mrs. Givhan, do you recall the amount of your contract with Western Line Consolidated School District for the year 1970-71?

A I believe that was around $6,000.

Q What is your educational background?

A I have a B.S. Degree in Speech, Dramatics and English.

Q What certificate classification do you hold?

[95] A I have an A-Type certificate.

Q For what grades?

A Secondary.

Q Secondary?

A Secondary certificate, yes.

Q Mrs. Givhan, were there any classroom disruptions or any other disruptions in that year '70-71?

A Not to my knowledge.

Q Involving you?

A Not to my knowledge.

MR. BANKS: I tender the witness, Your Honor.

THE COURT: You may take the witness on cross-examination.

CROSS-EXAMINATION

BY MR. ROBERTSHAW:

Q Mrs. Givhan, you were employed by Western Line in 1969 and '70, first at O'Bannon, is that correct?

A Yes, sir.

Q And then after the first semester the District was reconstituted so that all of the High School students went to Riverside and all of the Junior High and lower level students went either to O'Bannon or Glen Allan, is that correct?

A Yes, that is correct.

[96] Q Do you recall that taking place?

A Yes, sir.

Q Do you recall that prior to February the 2nd of 1970 that the teachers from O'Bannon were being sent to Riverside? I refer you to a Bill of Complaint. Was that the heading on the Bill of Complaint?

A I am not knowledgeable about a Bill of Complaint. I probably would need to look at that.

Q Would you recognize it if you saw it?

A Probably.

(Document produced by Mr. Robertshaw; handed to counsel for the plaintiffs and the Court.)

A (Examined) Yes, I recall this.

Q And that is your signature about half way down?

A Yes, it is.

MR. ROBERTSHAW: I thought the Court was reading it.

THE COURT: Well, I am trying to read it. It is a little hard to read. I don't want to stop you. You may go ahead.

BY MR. ROBERTSHAW:

Q Now, at that time school stopped. Do you recall when?

A Beg pardon?

[97] Q All right. Would you agree that approximately one week intervened between the time that school closed at O'Bannon and was scheduled to reopen at Riverside?

A Yes, I recall that. I think it was about two weeks, was it not?

Q I don't remember. Do you recall?

A I recall that period of time, yes.

Q Would you agree that it was either one or two weeks?

A Yes, I would agree to that.

Q And things were pretty much in confusion, isn't that correct?

A Yes, sir.

Q The majority of the children were not familiar with the school and didn't know where their rooms were, or anything?

A At Riverside, you mean?

Q At Riverside.

A Yes, I would agree to that.

Q And the same thing was true of the teachers?

A Yes.

Q There was a tremendous job of rescheduling classes and what not?

A Classes were scheduled when we got there, so I don't know if there was problems in rescheduling the classes [98] and teachers or not.

BY THE COURT:

Q Well, I guess you had a problem when you moved down to Riverside.

A Yes, sir.

Q But you had it solved, I presume.

A Well, I guess you could say it became a problem.

Q All right.

A We were told when we got there that we were still using the same roll books. We would still have the same classes that we had at O'Bannon and the roll books wouldn't change whatsoever.

I think the question was asked as to why we had moved if we were going to keep our same classes that we had at O'Bannon.

BY MR. ROBERTSHAW:

Q All right. Now, is it not a fact that a meeting was held during this one or two week period and drew up this document that we have here?

A I have no knowledge of the time that this was drawn up but I don't think it was during that particular time. This is very hard to see, but I believe it says, "We are distressed that no member of the former O'Bannon faculty or administrative staff was consulted or advised regarding the proposed schedule and teaching assignments that were [99] offered January 29th, 1970 in a general faculty meeting."

But there was another one there, Number 4, I believe, which said, "We are distressed that former O'Bannon Assistant Principal, Mrs. Millicent Jackson, was not presented to the High School faculty or her responsibilities outlined to the faculty."

Now, it seems to me that that was some time—maybe that was at this particular meeting where we were told that we would keep our same roll books, and so forth.

Q All right, this meeting was held after the O'Bannon school closed, at the end of the first semester?

A Yeah. I believe that was on a Friday, yes.

Q And it happened before February the 2nd, which was the date—

A It happened the Friday before February the 2nd. I believe February the 2nd was on Monday. We had this meeting on that Friday, I believe.

Q Isn't it a fact that as a result of this meeting that word got out to the administration that O'Bannon teachers would not report for duty on February the 2nd?

A I don't know about the word, but we did get letters on hearsay.

Q You did get a letter?

A We got a letter. I received a letter from the Superintendent, I believe he left in my door, or somewhere [100] at home.

Q And in substance that letter said it was necessary that every teacher be present?

A Yes.

Q And if you were not going to be present that it was a condition of your continued employment?

A Yes.

Q All right.

A I received this letter, yes.

Q Now, going back behind that. Do you recall a meeting at the O'Bannon gym, prior to the order of January the 20th, when there was under consideration a plan for an ungraded school system at the lower levels; do you recall such a meeting?

A Not right off, no. No, I don't recall that.

Q I was present, and Mr. Morris was present, and one of the Trustees, I forget who, was present; do you recall that now, an evening meeting of the teachers?

A I recall one meeting.

Q And the parents.

A I recall one meeting that you were at O'Bannon.

Q You recall you were sitting in the front, the second row from the front, by Mrs. Gentle Rowser?

A No, I wasn't sitting beside Mrs. Rowser at the meeting.

[101] Q Well, where were you sitting?

A I think I was sitting approximately, about, almost half way of the left aisle.

Q Okay.

A On the same side. I think Mrs. Rowser was up at the front. I wasn't up there.

Q And you knew the purpose of the meeting was to acquaint the parents and the teachers and some of the students with the plans for the new type of school?

A I didn't know what the purpose of it was for.

Q Was the purpose announced when the meeting was opened?

A I don't know. I don't remember.

Q Well, isn't it a fact that at the very outset of the meeting Mrs. Rowser got up with a list of demands or requests and stated that unless they were acted upon that they would not stay? Do you recall that happening?

A I recall Mrs. Rowser being in a meeting, and I am not sure whether it was that particular meeting or a meeting concerning two black teachers that had been placed at Riverside and they were asking that they be returned to O'Bannon because those vacancies had not been filled.

Now, the meeting that you are talking about—there were a lot of meetings during that Fall.

Q Well, let me identify the meeting for you further. [102] That when those demands of Mrs. Rowser were not met, then and there, between a third and a half of the people got up and left. Do you recall that?

A Yes, I recall that.

Q And in the meeting, did you stay or did you leave?

A I left.

Q And then as the meeting continued all of the people who left began blowing horns of automobiles?

A There may have been some horn blowing. I don't know.

Q Were you blowing your horn that night?

A No, I wasn't blowing any horn.

Q Did you hear horns being blown?

A It is possible. That has been quite a while back there. I don't know.

Q A lot of horns?

A Right now I can't recall any horns blowing. But it may have been, I said.

Q Okay. Now, while you were at Riverside, do you recall complaints being made by white students that you were downgrading their papers, giving them low grades?

A I haven't had any complaints about downgrading. When you say "downgrading", I don't understand that statement.

MR. ROBERTSHAW: [103] Would you indulge me just a moment?

THE COURT: Yes, sir.

(Mr. Robertshaw examining documents at counsel table.)

I think he meant by "downgrading", giving the white students a lesser grade than they were entitled to receive because they were white.

THE WITNESS: No, I haven't.

BY THE COURT:

Q You didn't receive any complaints along that line?

A No. I graded papers, whether they were black or white.

MR. ROBERTSHAW: If the Court please, I neglected to have the last letter marked as an exhibit.

THE COURT: All right, let it be marked as an exhibit.

(Defendants' Exhibit No. 7 received in evidence.)

BY MR. ROBERTSHAW:

Q Do you recall a student named Mona Lester?

A Lester?

Q Yes, ma'am.

A Yes, sir.

[104] Q Was she in your class?

A She was.

Q The Marshal has handed you a test on which there is a grade of 60.

A Yes.

Q Do you recognize that as Mona Lester's handwriting?

A It could be.

Q Did you grade that test?

A Yes, I did.

Q And was the requirement of the test that the nouns be circled?

A I don't know. There are no directions on here. I don't have the test. Do you have the test?

Q And on the back it says, "Do not write on back of paper."

A Yes, I did.

Q Now, there is a number 60 up there. Is that the grade you gave on this test?

A That was the grade I gave on this particular test.

MR. ROBERTSHAW: I would like that introduced into evidence, if the Court please.

THE COURT: All right, let it be received.

[105] (Defendants' Exhibit No. 8 received in evidence.)

Do you have the test?

MR. ROBERTSHAW: Sir?

THE COURT: Do you have what the test was? The nature of the test; do you have any record about what the nature of the test was?

MR. ROBERTSHAW: The nature of the test, as the witness has testified, is that all of the nouns were to be circled.

THE WITNESS: No, I didn't say that.

THE COURT: She didn't testify to that.

MR. ROBERTSHAW: All right.

THE WITNESS: I didn't say that.

THE COURT: That is the reason I asked you myself, she didn't.

MR. ROBERTSHAW: That is what I understood. I thank the Court.

THE COURT: [106] Yes, sir.

MR. ROBERTSHAW: Hand the exhibit back to her, please.

(Defendants' Exhibit No. 8 returned to the witness.)

BY MR. ROBERTSHAW:

Q What was the nature of the test, Mrs. Givhan?

A As I said, I don't recall the directions that I had given on this test, and I asked you if you had a copy of the directions. Because in dealing with English and in dealing with sentences you may be asking two or three different things in one sentence, or you could be asking for only one. So, at this particular time, I can't say whether I was asking for nouns or whether I was asking for nouns and adjectives, or whether we are dealing with subject and predicate adjectives, or predicate nominatives as they appear in the sentence. I don't know what I was asking for at that particular time.

Q Okay, look at the circled words that are not marked as incorrect. What do they have in common?

A The circled words and what?

Q That are not marked with an "X", what do they have in common?

A What do you mean, "What do they have in common"?

Q I mean, what do they have in common?

[107] A You said the ones, the sentences that are not marked with an "X"?

Q All right, let me narrow the question. Number 1—

A Yes.

Q —the word "speaker" is circled?

A Yes.

Q The word "class" is circled?

A Yes.

Q The word "individual" is circled?

A Yes.

Q The word "integrity" is circled?

A Yes.

Q Now, what do those words have in common, as a matter of English?

A They could be all nouns.

Q All right.

A And then when you talk about parts of speech, they could come under that heading.

Q Beg pardon?

A When you talk about parts of speech, they could come under that heading. They come under the heading of parts of sentences.

Q I will have to ask you to speak more slowly, I can't understand you, Mrs. Givhan.

They are all nouns, is that not correct?

[108] A Well, I haven't analyzed the sentence.

Q All right, analyze it.

A (Examined) Yes.

Q Now, in the second question or sentence, are they all nouns?

A Yes, they are all nouns. Now, there is a difference in sentence number one and sentence number two. Sentence number two is dealing with the name of something,

which is in quotations. If you will notice there, "God Bless our Home" is considered one word.

Q All right, is that why you marked that wrong?

A It could be possible. I don't know.

Q Well, what is the—

A As I said, I can't recall the directions that I gave in this. And to give you a true statement as to what happened there right now, I don't know the directions that I gave.

Q Okay, look at the third question, and the circled words, are they not all nouns?

A (Examined) Now, if you will look at the word "perserverance" in there, I circled that word in ink. The others are circled with pencil.

Q What word?

A In number two up here, also, the word "words" up there in number two has been circled in ink, which means I [109] did it. She did not circle that word. And in number four—

THE COURT: Now, he didn't ask you about number four. He will get to number four.

A Now, in number three, you will notice that you don't see any ink in number three at all.

MR. ROBERTSHAW: May I approach the witness, if the Court please?

THE COURT: Yes, sir.

BY MR. ROBERTSHAW:

Q That is the original that you have, is it not?

A This is the original, yes.

Q All right.

A You see, here I circled that showing her that she did not circle that word (Pointing). And in number four, I circled it showing her that she did not circle that word. And in number six, I circled it. You will notice it is in ink (Pointing).

I am showing her that she did not circle those words.

Q Well, now, if I may—

THE COURT: Was this a matter that was given consideration by the Principal when he decided that he would not [110] recommend this teacher for employment or is this something that has been resurrected since the lawsuit has started?

MR. ROBERTSHAW: No, sir.

THE COURT: As a basis for the justification?

MR. ROBERTSHAW: To give the Court what I am trying to get at, I am showing these activities, first, that they are taken into consideration as an accumulative matter, and second, that she was recommended for rehiring at the end of 1969 and '70.

The implication and the thrust of the evidence is going to show that she was not tendered a new contract on the basis of any activities that she may have taken.

THE COURT: Well, that is what I want to know. I want to know whether or not these matters were taken into consideration by Mr. Leach at the time he made the decision not to recommend her, because the question is whether or not she was discriminated against in his recommendation because she was a member of the black race.

[111] I can't consider things that have happened since that time that have been discovered and brought into the file with reference to it. I have to make a judgment on what happened at that time, what he had before him. So that is the reason I asked you whether or not Mr. Leach had all this before him, all this information in making his decision that he would not recommend to the Superintendent that she be reemployed.

MR. ROBERTSHAW: If the Court please, to be perfectly accurate, so that I will not mislead the Court, the recommendation was made by Mr. Leach on the basis of his experience with this teacher during the 1971-72 period.

THE COURT: He has testified to that.

MR. ROBERTSHAW: Yes, sir. The recommendation was acted upon by the Superintendent and by the Board on the basis of the adverse recommendation, and all of this material which was in the file and known to the Superintendent.

THE COURT: At the time?

MR. ROBERTSHAW: At the time—

THE COURT: [112] At the time the recommendation was made?

MR. ROBERTSHAW: The recommendation was made that she not be hired.

THE COURT: All right.

MR. ROBERTSHAW: Now, I am going to be hampered in that specific proof, and I was trying to get at it indirectly because Mr. Morris is just simply not in any physical condition to testify before the Court.

THE COURT: Well, all right.

BY MR. ROBERTSHAW:

Q Would you mark with this colored pencil on Exhibit 8 each word that you circled as opposed to a word circled by the student?

A What do you mean "mark it"?

MR. BANKS: This letter has not been identified as to the particular year when it occurred and we object to any further testimony about it.

THE COURT: Well, I am going to let him continue his examination about it. Of course I will have to find [113] out what connection it has with the refusal to hire or rehire this individual. That will have some bearing upon the weight and credibility of it.

You may proceed with your examination.

BY MR. ROBERTSHAW:

Q If you will, circle in orange ink each word on this exhibit that you originally circled.

THE COURT: Now, wait just a minute.

Q Are you marking on the original paper?

A Yes, I am marking on the original.

MR. ROBERTSHAW: Then mark on a copy.

THE COURT: Mark on a copy of it so the original stays just like it is. You can refer to the original in order to make the necessary entry on the copy.

(Witness marked in orange ink on a copy of Defendants' Exhibit No. 8.)

THE COURT: Now, let me have it so I can mark my copy.

(Marked copy handed to the Court by the witness.)

All right, thank you. You may introduce that or may have that attached to the original for the purpose of the record, Mr. Robertshaw, after you are through. [114] If you want to use it to cross-examine her, you may.

MR. ROBERTSHAW: All right, sir.

THE COURT: I would like it to be made a part of the exhibit so it will reflect the examination here.

MR. ROBERTSHAW: Let me offer it as Exhibit 9.

THE COURT: All right.

THE CLERK: Defendants' Exhibit No. 9 received into evidence.

MR. BANKS: Is Exhibit 8 and Exhibit 9 the same?

THE COURT: Exhibit 9 is a copy of Exhibit 8 with the words which this witness circled, after they had been circled by the student, and marked in orange.

BY THE COURT:

Q Is Mona Lester white or black?

A Yes, sir, she is white.

Q A white child?

A Yes.

(Document produced by Mr. Robertshaw; handed to the witness.)

[115] THE WITNESS: I had about sixteen whites in that room.

THE COURT: You may proceed.

BY MR. ROBERTSHAW:

Q I hand you another test.

THE WITNESS: Have you finished with this one (Exhibiting)?

MR. ROBERTSHAW: Yes, we are finished with that one.

THE WITNESS: Okay, I would like to make an explanation on it.

THE COURT: All right. Just a moment, she wants to make an explanation.

THE WITNESS: In sentence number six, in which the student circled the word "room", the proper thing that was supposed to have been circled, that is why I left that particular circle open that I made, was the word "dining room", because that is a compound noun.

And sentence number eight, where she circled "Grant" and then circled the word "Park", that was a proper noun, and it was one name, "Grant Park".

And the last word of that particular line, "Sue", [116] and under that line, "Smedley", that was a person's name, and I was letting her know that you don't circle "Sue" and then circle "Smedley", that it was a continuation there of one word.

MR. ROBERTSHAW: All right.

THE COURT: All right. She wanted to make that explanation.

BY MR. ROBERTSHAW:

Q Now, would you examine the other test that I have handed you?

A (Examined) Yes, I see it.

Q Is this also a test taken by Mona Lester in your class?

A Yes, it is.

Q And this is the grade that you gave?

A Yes, it is.

Q Now, if you look at the sheet attached to that and compare it with the test. Is that not simply a typed copy of the indistinct ditto. material?

A (Examined) Yes, this is taken from that.

MR. ROBERTSHAW: We offer that as Exhibit 10, if the Court please.

THE COURT: All right, it will be received.

[117] (Defendants' Exhibit No. 10 received in evidence.)

MR. BANKS: Is that the original, Your Honor?

THE COURT: Yes.

MR. ROBERTSHAW: It is the original.

THE COURT: Do you want to make an explanation about it?

THE WITNESS: About that?

THE COURT: Yes.

THE WITNESS: I don't know what he was driving at.

BY THE COURT:

Q But you recognize it as the results of a test you gave?

A Yes.

Q This person?

A Yes.

Q Mona Lester, I believe.

A Yes.

THE CLERK: Defendants' Exhibit No. 10 received into evidence.

[118] THE COURT: Mr. Robertshaw, it is 12 o'clock, so let's take a recess now until 2 o'clock this afternoon.

(Court recessed from 12:00 p.m. until 2:00 p.m. The trial then resumed in open court.)

THE COURT: Be seated, please. All right, you may proceed.

CROSS-EXAMINATION, RESUMED

BY MR. ROBERTSHAW:

Q Mrs. Givhan, do you recall an incident at Riverside in March of 1970 when a shakedown was conducted for weapons?

A I recall that, sir, yes.

Q Specifically, about March 16th or 17th.

A I can't recall the date of that.

Q And the students in your room were searched.

A Yes, the students in my room were searched.

Q Right. Now, were you charged with having taken up knives and weapons prior to the search?

MR. BANKS: Your Honor, we object to the testimony about March of 1972 and 1973. She was discharged in the Fall of '70 and '71.

THE COURT: The objection is overruled. This was in 1970?

[119] MR. ROBERTSHAW: March 17th, 1970.

(Document produced by Mr. Robertshaw; handed to the witness.)

BY MR. ROBERTSHAW:

Q The Marshal has handed you a memorandum from the Principal. I would like for you to read that and refresh your memory.

A (Examined) I am in knowledge of the incident but I am not in knowledge of the writing here. I did not get a copy of this, no.

Q I'm sorry. I didn't understand you.

A I said, I am in the knowledge of the incident but I am not in knowledge of the copy here. I have never seen a copy of this.

THE COURT: She says she has never seen a copy of it.

BY MR. ROBERTSHAW:

Q Does that fairly state the facts of the incident?

A (Examined) I didn't ask anybody in my room did they have a knife, no.

Q Specifically, did you take up any knives prior to the shakedown?

A One child gave me a knife.

Q What child?

[120] A I can't recall who it was. He was in my class.

Q Was it Roy Rogers?

A It could have been.

Q Did you give that knife back to this child after the incident?

A Yes, I did.

Q And later on that evening he cut another student with it?

A Well, I wasn't in knowledge of that until—I think it was Mr. Richardson mentioned that.

Q Do you know whether or not another child was cut later on during the day?

A I was told by Mr. Grisham, but I was not in knowledge of it.

Q Do you have any reason to disbelieve it?

A No, I don't have any reason to disbelieve it.

Q Were you also told that the student that did the cutting was Roy Rogers?

A He may have told me, but I didn't know Roy Rogers. He was not in my classroom.

Q I see.

A And I would like to comment on that. This particular student came to me and told me that he had a knife, and he asked me if I would keep the knife for him until school was out. And I told him, "Yes". And I told

him that I had [121] a class the last period in the afternoon and that he would have to come back and pick it up during the break, which was about 3 o'clock, I think the break was.

And I took that knife due to the fact of educating him. I told him that I would take this knife and I would give it back to him, and "I want you to put it in your pocket and take it home and don't bring it back anymore". And I did that as an act of education and discipline.

Q All right. Now, let me ask you this question: After this student had given you the knife, was there a search of the students in your room for knives and other weapons?

A Yes, there was.

Q Did you—

BY THE COURT:

Let me ask a question right there.

Q When you took the knife, did you know there was going to be a shakedown?

A I was informed by another teacher.

Q At the time you took the knife you knew that there was going to be a search?

A Yes, by another teacher. It wasn't from the administration.

Q But you had knowledge of the fact that the search was going to be made and was contemplated?

[122] A Yes.

THE COURT: All right.

BY MR. ROBERTSHAW:

Q Now, during the time that the people conducting the search were in your room did you advise them that you had this knife?

A Did I advise who?

Q The people who conducted the search.

A No, I didn't advise them that I had the knife.

Q And after the search was over, later on that day you returned the knife to Roy Rogers?

A I said at 3 o'clock, yes, sir.

MR. ROBERTSHAW: If the Court please, we would like to offer that as an exhibit, as Exhibit 11.

THE COURT: All right, let it be received.

(Defendants' Exhibit No. 11 received in evidence.)

MR. BANKS: She testified that this is a letter from Mr. Morris. I object to it being introduced. No foundation had been laid for its introduction.

MR. ROBERTSHAW: I believe she said it fairly stated the facts of [123] the incident.

THE COURT: I have ruled on it, Gentlemen.

MR. ROBERTSHAW: Excuse me.

THE COURT: I said it could be introduced. There should be no argument between counsel about it. Any remarks you have should be addressed to the Court about such matters.

MR. ROBERTSHAW: I apologize, Your Honor. I had no intention to—

THE COURT: It is received in evidence solely on the basis of what she said, that she recognized the incident and has testified about it.

THE WITNESS: The only statement in the classroom—

THE COURT: I understand.

BY THE COURT:

Q You stated that did not happen with reference to your classroom?

A Yes, sir.

Q You stated, though, that you received the knife from this boy after you knew they were going to have a [124] shakedown of the various classrooms?

A Yes, sir.

Q And that you returned it to him later?

A Yes, sir.

THE COURT: I will consider it for that purpose. Introduction of the rest of the statement would be pure hearsay.

BY MR. ROBERTSHAW:

Q Going now to the fall of 1970, in what capacity were you employed at Glen Allan?

BY THE COURT:

Just a moment. Let me go into this a little bit.

Q Who is this supposed to have come from? It doesn't show here.

MR. ROBERTSHAW: That is a memorandum from Mr. Grisham, the Principal of Riverside to the staff and faculty.

THE COURT: It doesn't show on it anywhere, at least that doesn't appear on it anywhere that he issued it. His name doesn't appear on it anywhere.

MR. ROBERTSHAW: No, sir. I asked if it fairly stated the situation and she said that it did.

THE COURT: [125] It will be received only for that purpose.

MR. ROBERTSHAW: All right.

BY MR. ROBERTSHAW:

Q In what capacity were you employed at Glen Allan Attendance Center?

A Junior High English teacher.

Q What were your duties in that position?

A To teach English.

Q To teach English?

A Yes.

Q And those were your only responsibilities, I mean, that is what you were hired for, to teach English, is that correct?

A Yes.

BY THE COURT:

Q Were you assigned any other duties?

A Hall duties during lunch periods, and hall duties during the breaks. You have to take care of the area around your room.

THE COURT: I understand.

BY MR. ROBERTSHAW:

Q And that was over and beyond your duties?

A Over and beyond my duties as a teacher, yes, sir.

[126] Q All right. Now, do you recall when the complaint about the N.Y.C. workers occurred?

A What do you mean; what date?

Q Yes, ma'am.

A I don't recall what date, but it had to be after approximately October the 6th, because we didn't have a principal prior to that.

Q Would you look at this letter, please, and tell me if it refreshes your memory?

BY THE COURT:

Q Is that October 6th, 1970?

A Yes, sir, I believe it was.

(Document handed to the witness by Mr. Robertshaw.)

BY MR. ROBERTSHAW:

Q Have you examined that?

A Yes.

Q Would you agree that the incident took place in early December?

A I can't testify to that.

Q Okay. When was your husband appointed the Assistant Principal at Glen Allan?

A I think it was after we returned from the Thanksgiving Holiday.

Q It was during 1970?
A Yes, sir, it was.
[127] Q And I believe you testified that it didn't look good to have all blacks in the administration office.
A Mr. Givhan was only appointed as Assistant Principal. His class load was not reduced. He was teaching four classes per day, and I don't call that assisting anybody. He had as many classes as I had.
Q My question was—I believe you testified that it didn't look good to have all—
A It didn't.
Q —all blacks in the administration office.
A It didn't, because he was not in the office.
Q And the administrative offices were all in a group, were they not?
A Yes.
Q And Mr. S. S. Jackson had his desk in those offices?
A Yes, he did.
Q What is his race?
A He is black.
Q And Mr. Givhan's desk was in those offices?
A He didn't have a desk.
Q He did not?
A Not to my knowledge. He had no desk.
Q He didn't move into the administrative office then?
A No.
Q When did he?
[128] A The next year, I understand.
Q You mean in 1971?
A Yes.
Q But during this same school year?
A Come again.
Q During the '70-71 school year?
A No, he didn't have an office during that year because he had classes.
Q I see. Now, Mrs. Hodges' office was also in the administrative offices, was it not?

A No, it wasn't. I wouldn't consider that the administrative office, no.
Q Was it right next to them?
A It was across the hall, down the hall.
Q In the same area?
A At one time it was.
Q At that time?
A At which time?
Q In early December of 1970.
A It is a possibility because I think she was put in a reading room in the library, and she said she was too far from the students.
Q So that there was at least Mr. Jackson and Mrs. Hodges who were black who were part of the administration, and I believe you testified that Mr. Givhan did not have an [129] office or desk during that school year.
A No.
Q Okay. Now, in the faculty meetings that were conducted during 1970 and '71, isn't it a fact that you did object to policies that were announced by the Principal?
A Well, if you will allow me to say this, I think we had two faculty meetings. One meeting was a week, I believe, after Mr. Leach was appointed Principal down there. And the next meeting was when he passed out intention slips for the next year. He called a meeting just prior to our leaving for the teachers meeting in Jackson. I think it was on Wednesday he passed out the intention slips and we had a meeting about that.
Q Is it your testimony that there were only two faculty meetings?
A There were only two, that I recall; only two.
Q Did you announce in the first faculty meeting that you were not going to give the achievement test?
A In the first faculty meeting?
Q Yes.
A No, I did not announce it in the first faculty meeting I would not give the achievement test.

Q Did you announce it prior to the time the test was to be given that you would not give the test?

A I don't think that I said that I would not give [130] the test, in those words, no.

Q What did you say?

A I said that I felt that the Counselor should give the test, should administer standardized tests.

Q All right, did you discuss this question with Mr. Leach?

A No, I hadn't. On that particular—

Q On any occasion.

A You are talking about that meeting or have you skipped to another occasion?

Q On any occasion prior to the time the test was actually given.

A On the morning of the test I think Mr. Leach approached me about the test, yes.

Q What did he say to you at that time?

A He said, "Mrs. Givhan, this is the morning of the test", and I said, "Yes, it is". And he said, well, something to the effect that Mrs. Hodges said that you said you were not going to give the test. And I said, well, I said, "I may have told Mrs. Hodges that I wasn't going to give the test", I said, but, "Number one, I still feel that it is the Counselor's duty to give the test". And I said, "Number two, that I have a lot of clerical work that I have to get off before Wednesday". And that was the next day, for the next day. I had to put grades on the cards. I hadn't turned in the grades to the [131] office, plus I hadn't finished grading my test papers. And I told him that I had all of that to do.

He said, "Well, I will get somebody else to do it", in essence, and I said, "Well, okay." He said, "Well, Mrs. Givhan", he said, "since you've got so much to do", he said, "you can sit there in the lounge", you know, "and work on your cards". I said, "No", I said, "I don't work

on school time in doing work like that". I couldn't deny my class to do work like that.

So, I told him, I said, "I will give the test, if you will send someone up there to help me".

Q But you knew, did you not, that it was the policy of the school to give that achievement test at the same time throughout the district, did you not?

A Yes, sir. I suppose it was the policy, yes.

Q That was so that no student could discuss with another student what the questions were?

A That is a possibility.

Q Because it was a standard test?

A That is a possibility.

Q All right. Now, there were three people in the room at the time the test was actually administered, weren't there?

A No.

Q Who was there?

[132] A Who was in the room?

Q Right.

A There were two people in the room.

Q Well, how many teachers were there in the room?

A There were two teachers in the room. That is what I am speaking of.

Q And who were they?

A Mrs. Butler and myself.

Q Mrs. Mary Butler?

A Yes.

Q And Mrs. Mary Butler was originally one of the plaintiffs in this action?

A Yes.

Q Was she not?

A Yes.

Q Was Mrs. Hodges in there at any time?

A No, I didn't see Mrs. Hodges in there. Mrs. Hodges, before the test started, she came to the room—. I have

to go back and give you my routine in the morning that I did.

I checked the roll. I didn't call the roll, I checked the roll, because the children were seated. And I always sent a student to the office to pick up the lunch tickets. And that process was going on at the time Mrs. Hodges came to the room.

[133] Mrs. Hodges came to the room. She said, Mrs. Givhan, I want your students. I said, "Why do you want my student's?" And she says, "I am going to take them to another room to give them the test". I says, "I am going to give the test. I told Mr. Leach this morning I was going to give the test". And so Mrs. Hodges backed on back out the door.

Q Who in fact gave the instructions for taking the test?

A I gave a portion of it and Mrs. Butler gave a portion of it.

Q All right. Now, do you recall the incident of the memorandum that you got with reference to setting the six week's tests?

A I beg your pardon, sir. It wasn't a six week's test, it was a semester test.

Q What kind of test was it?

A A semester test.

Q A what?

A A semester test.

Q A semester test?

A Yes.

Q Okay. And you objected to giving it at that time?

A No, I did not object to giving the semester test, no.

Q Well, what objection did you raise?

[134] A I raised the question of the time.

Q And what was that question?

A The question I asked Mr. Leach, I said, "Mr. Leach, have you taken into consideration the time element between the six week's test and the semester test?" A six

week's test you usually gave it on Thursday and Friday and you had the weekend, and the cards were due on Wednesday of the next week. That weekend you had to check your papers, record your grades, work out the average, record it in the office and then put it on the cards, and then you gave the cards out on Wednesday.

A semester test, to my knowledge, and the way I had given tests in the past, requires a longer test, and you have to have more time to grade that test. At O'Bannon, the years that I worked at O'Bannon, I don't know whether it was a district policy or not or a school policy, but we had two weekends and a week for a semester test. We gave it on Thursday and Friday, we had that weekend, we had the whole next week and then the next weekend, and then we gave out our cards the next week. And I was asking Mr. Leach, going through the chain of command, in which I was not supposed to go to the Superintendent but approach him as to the time.

Q Well, it was Mr. Leach's responsibility to set the time for the test, was it not?

A It was his responsibility, yes.

[135] Q And the other teachers found no problem with it, did they?

A I don't know.

Q I see, but you did?

A I found a problem of time, yes.

Q All right. Now, Mrs. Givhan, you know, do you not, that the cafeteria personnel are hired by the district?

A Everybody is hired by the district.

Q Well, the cafeteria personnel is run by the district and not by the principal, you knew that, didn't you?

A I didn't, no.

Q You did not know that?

A I thought all facets of the school was run by the principal, under his administration.

Q All right, who is the supervisor for the cafeterias in the district?

A I don't know.

Q Who was at that time?

A I think Mrs. Maddox.

Q Mrs. Maddox?

A I believe so.

Q Where was her office located?

A At the Central Office.

Q Who hired and fired the people in the Glen Allan cafeteria?

[136] A I don't know.

Q Who recommended them?

A I don't know.

Q What responsibility did you envision Mrs. Maddox as having?

A What do you mean, envision that she had?

Q What responsibility did you think Mrs. Maddox had with reference to running the Glen Allan cafeteria?

A All I know, she was supposed to have been District Cafeteria Supervisor. Now, what she did, I don't know.

Q Okay. Well, now, prior to the time that the person to whom you complained was hired to take up the tickets, who took the tickets up?

A I think they had two teacher aids to take up the tickets, and they were black.

Q Right. And isn't it a fact that they took up very few tickets?

A I don't know. I don't know anything about that.

Q Isn't it a fact that they didn't collect for any lunches?

A I don't know.

Q Isn't it a further fact that the E.S.E.A. people objected to the use of the teacher aids for that purpose?

A Not to my knowledge.

Q Not to your knowledge?

[137] A No.

Q What was your objection to the hiring of a white student to do that?

A Well, you said they didn't allow the teacher aids to do it. The person that was doing it, as I understand it, was a teacher aid.

Q All right.

A It was a white teacher aid.

Q Now, what responsibility was it of yours as an English teacher as to who ran the cafeteria?

A It wasn't my responsibility, but in my conversation with Mr. Leach, I told him that even the person in the cafeteria who was taking up the tickets was white. And this is why I spoke to him about all the choice jobs were white.

Q How many white people were there in the cafeteria?

A I don't know the number there was in there, but I know there was a lady, one white lady that was working on the—I don't know about the number.

Q As a matter of fact, the lady that was hired to take up the tickets was the only white there, wasn't she?

A No, sir.

Q Wasn't she?

A No, sir, she was not the only white. Miss Hughes was there.

Q All right, Mrs. Hughes?

[138] A Yes.

Q The supervisor, the manager of the cafeteria was black?

A Well, she was just there in person.

Q Beg your pardon.

A She was there in name, the same as Mr. Givhan was the assistant in name.

Q Now, as an English teacher what responsibility of yours was it to see where the N.Y.C. workers went?

A Because when I was at Riverside, when we had white N.Y.C. workers and black, the whites worked in the office and the blacks washed the windows.

Q My question was, as an English teacher at Glen Allan what responsibility was it of yours as to where the N.Y.C. workers worked?

A Well, I just wanted them to have the same opportunity as the white N.Y.C. workers had.

Q I don't think you understand my question. Isn't it a fact that it was not within the scope of your employment to deal with the N.Y.C. workers?

A I wasn't dealing with the N.Y.C. workers. I was pointing out to Mr. Leach the discrepancies there in the duties.

BY THE COURT:

Q But you had no duty to perform with reference to [139] the N.Y.C. workers, that is what he is trying to find out.

A No, I did not have.

Q You were just expressing your opinion?

A Yes.

Q That they were given the menial jobs?

A Yes, right.

Q Instead of the better jobs, and you were voicing an opposition to that program?

A Yes, sir.

BY MR. ROBERTSHAW:

Q Mrs. Givhan, isn't it your contention that you were not rehired because you are black?

A Sir? What?

Q Is it your contention that the reason you were not rehired is because you are black?

A Because I am black?

Q Yes.

A Because I am black and outspoken.

Q And what?

A Because I am black and I speak my opinion.

Q All right. Now, your husband, Mrs. Givhan, is also black, is he?

A Yes, he is. I hope so.

Q And he was appointed Assistant Principal during 1970-71?

[140] A During 1970-71, yes.

Q And he was reemployed in that position for the following year?

A Yes, he was.

Q And he is still in an administrative capacity in Western Line, is he not?

A You will have to ask him that.

MR. ROBERTSHAW: All right. I have no further questions.

THE COURT: All right. Anything on redirect?

MR. BANKS: Yes, sir.

REDIRECT EXAMINATION

BY MR. BANKS:

Q Mrs. Givhan, earlier in your testimony on cross-examination Mr. Robertshaw asked you about the teachers meeting at O'Bannon, I believe, or at Riverside. Which school was it?

A I think it was O'Bannon that he mentioned.

Q What was the purpose of having a meeting?

A The purpose of having that particular meeting was to restore two teachers that had been placed at Riverside.

Q How did these teachers come to be placed at Riverside?

[141] A Well, I think at that particular time they were integrating the faculties at all schools, so I was told, and Mr. Givhan and Mr. Clark Cathey—

Q Were they black or white?

A They were black.

Q All right.

A —in the Math and Science Department of the O'Bannon School were placed in the Riverside school.

Q Were any white teachers placed at the O'Bannon School?

A No.

Q Was anybody placed at the O'Bannon School to take the place of Mr. Givhan and Mr. Cathey?

A No.

Q Is that what it was all about?

A Yes. And I think this came before the judge, that these two teachers had been placed at Riverside against their will. And I think the judge ruled that they would have a choice, to either stay at Riverside or return to O'Bannon, and they did return to O'Bannon.

Q Does your husband have any difficulty with the administration since you have been terminated?

A Quite a bit.

MR. ROBERTSHAW: I didn't hear the question.

[142] THE COURT: He asked whether or not her husband had had any difficulty with the administration since she had not been reemployed and she said that he had.

BY MR. BANKS:

Q In what respect?

A Well, Mr. Givhan has been pressured from various angles. And a lot of—

THE COURT: Just a moment.

MR. ROBERTSHAW: I object to this. It is irrelevant.

THE COURT: Objection sustained. It may not be irrelevant, but it is hearsay. I sustain it on another ground.

MR. ROBERTSHAW: Yes, sir.

BY MR. BANKS:

Q Do you have personal knowledge of any of these pressures?

A Yes. I believe that was the year that he was recommended not to return to Riverside, I mean, to Glen Allan School. I think Mr. Leach had been in the hospital.

Q Were you present during any of this, is what I am asking.

[143] A Was I present?

Q Were you present?

A No, I wasn't present.

THE COURT: You see, he can testify for himself about that. You can't testify for him.

THE WITNESS: I see.

THE COURT: That would be hearsay.

THE WITNESS: Yes, sir.

MR. BANKS: We have nothing further, Your Honor.

THE COURT: You may step down. Are you through?

MR. BANKS: Indulge me for just a moment, Your Honor.

THE COURT: Just a moment. Just have a seat.

(Counsel for the plaintiffs conferring off the record.)

BY MR. BANKS:

Q Mrs. Givhan, have you ever graded white students differently from black students?

[144] A No, I haven't.

Q Now, with regard to the knife incident, why did you take the knife from the young man who gave it to you?

A Well, the expression you used, "take from", he gave me the knife. He asked me to keep the knife because at this particular time there were blacks thrown out of school by the twenties and twenty-five's. And one incident, they had to come to court on the hair case, and a number of them were getting thrown out of school. And,

you know, it was a series of incidents, a series of bomb threats. The children were put out of school.

And this particular morning I came in knowledge of the fact that there was supposed to have been a shakedown. And this young man came to me and told me that he had heard of the shakedown and, you know, he asked me to take his—would I keep his knife for him and I told him "Yes", that I would keep it until the end of school, but I had a class at the end of school and I would have to return it to him at the break at 3 o'clock.

And so at 3 o'clock he came back for the knife. And I told him then, I said, "You put that knife in your pocket, take it home and don't bring it back to school, tomorrow or any day, because anything that they can throw you out of school with, they will do it".

Q Did you have any knowledge he intended to get [145] into a fight that afternoon?

A No.

Q Did you have any knowledge about a fight brewing that afternoon?

A No, I didn't.

MR. BANKS: No further questions, Your Honor.

THE WITNESS: May I see Exhibit No. 10?

THE COURT: The witness wants to see Exhibit No. 10, please. Pass it up to her.

(Handed to the witness.)

THE COURT: Is that what you wanted to see?

THE WITNESS: Yes.

MR. ROBERTSHAW: Sir?

THE COURT: I says, the witness wants to see Exhibit No. 10. She wants to look at it. She asked me to have it shown to her and I am going to accede to her request.

(Examined by the witness.)

THE COURT: [146] Do you want to make a further explanation about that?

THE WITNESS: Yes.

THE COURT: All right.

THE WITNESS: Mr. Robertshaw didn't say what he was looking for in Exhibit No. 10. I don't know whether he was going just by the low grade or whether the information was correct.

THE COURT: Do you want to make some explanation about it?

BY THE COURT:

Q Did you grade it?
A Yes, I did.
Q Did you grade it correctly?
A Yes, I did.

BY MR. BANKS:

Q You have no problem with Exhibit No. 10 as to the way you graded it?

A No, I don't have any problems.

MR. BANKS: No further questions.

THE COURT: [147] All right, do you care to continue cross-examination?

MR. ROBERTSHAW: I have just one question, if the Court please.

THE COURT: All right.

RECROSS-EXAMINATION

BY MR. ROBERTSHAW:

Q Mrs. Givhan, who did call the meeting at the O'Bannon gym in the fall of 1970?

A You mean who sent out notices?

Q Who scheduled it, who called it?

A I don't know who called it. I don't know who asked that the meeting be held there. The information may have come from Mr. Williams that the meeting would be

there that night, or it may have been some of the parents. As I said, there were a series of meetings in which Mrs. Rowser was speaking in behalf of the parents and her children who had been without teachers for six weeks.

Now, as to who called the meeting, I don't know whether they called it and asked you and your Board and the Superintendent to be there. I don't know who called it.

Q How do you know what the purpose of the meeting was?

A You asked me a while ago if I knew the purpose and I told you I did not.

[148] MR. ROBERTSHAW: I see. Thank you.

BY THE COURT:

Q Now, this knife incident took place in March 1970?

A I can't recall the month. It was during the time I was at Riverside.

Q Did you teach the next year?

A Yes, I taught that summer, and I was rehired for the next year.

Q Had you ever been confronted with this kind of a charge?

A No.

Q Before?

A No. I didn't even know they had that on the record.

Q And you were rehired for the '70-71 school year?

A Yes, sir.

Q For the last time?

A Yes.

Q But you were not elected for—

A '71-72.

Q —'71-72?

A That's right.

Q But you were reelected for the year '70-71?

A Yes.

Q But you were not reelected for the '71-72 year?

[149] A Right.

THE COURT: All right.

MR. ROBERTSHAW: May I ask a few additional questions in view of the questions by the Court?

THE COURT: Yes. I was just trying to get the timing of these things.

MR. ROBERTSHAW: Yes.

BY MR. ROBERTSHAW:

Q As a matter of fact after that incident you were talked to rather severe by Mr. Grisham, who was the then Principal, were you not?

A Mr. Grisham didn't talk to me severely, as you are saying.

Q You were called into the office?

A I was not called into the office. He came to my classroom.

Q But you did have a conversation with him regarding this incident?

A He came to me and he told me that the description that the young man had given as to what teacher he had given his knife to seemed to have been me.

[150] Q Yes.

A And I was in my classroom and not in his office.

Q Did he chastise you or criticize you for it?

A No, he didn't criticize me.

BY THE COURT:

Q Did he have this knowledge at the time you were a teacher?

A Yes.

Q What did he say to you with reference to it?

A He just said, "You shouldn't have done that", and walked out. And I don't call that a reprimand.

Q That was Mr. Grisham?

A Yes, sir.

Q And he was a former Principal, is that right, of the school?

A Of Riverside, yes.

Q Where you were then employed?
A Yes.
THE COURT: All right, you may step down. Call your next witness.

(The witness resumed her seat at the counsel table.)

MR. BANKS: Arcell Jacob.

[151] AND THEREUPON,

ARCELL JACOB,

called as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

THE COURT: You may proceed.

DIRECT EXAMINATION

BY MR. BANKS:

Q State your name, Mr. Jacob.
A Arcell Jacob.
Q Where do you live?
A Greenville.
Q Where are you employed?
A Lake Village public schools.
Q In Arkansas?
A Yes, Arkansas.
Q How long have you been employed there?
A This is my second year.
Q Where were you employed before you were employed at Lake Village?
A Western Line District.
Q What school did you work at?
A Glen Allan.
Q In what capacity?
A Teacher.
[152] Q Were you there in 1970-71?
A Yes, I was.

Q Did you know Mrs. Givhan?
A Yes, I did.
Q Do you know Mrs. Dollye Hodges?
A Yes, I do.
Q Do you know Mr. Leach?
A Yeah.
Q I draw your attention to an incident involving the standardized test in the fall of 1970. Do you recall that incident?
A Yes, I recall it.
Q Do you recall going to Mrs. Givhan's room on that day?
A Yes, sir.
Q Would you tell the Court whether or not Mrs. Givhan was administering the test?
A She was.
Q What was your position with regard to the test?
A To help with the test.
Q Did you have a home room at that time?
A No, I didn't.
Q Do you know Mrs. Mary Butler?
A Yes.
Q Did she have a home room at that time?
[153] A Not as I recall.
Q Were you both assigned to help the teachers administer the test?
A Yes.
Q Do you recall whether during the year 1970-71 Mrs. Givhan exhibited any hostile attitude toward Mr. Leach?
A No.
Q Did you notice any breakdown in the working relationship between Mrs. Givhan and Mr. Leach?
A No, I didn't.
Q Did you notice Mrs. Givhan and Mrs. Hodges in their relationship?
A No.

Q You did not notice their relationship?
A Their relationship was good, from my standpoint of it. I never did see any evidence of any disturbance.
Q Did you attend any of the faculty meetings that were had?
A Yes, I did.
Q Can you tell the Court whether or not there were any disruptions during any of the faculty meetings because of any discussions between Mrs. Hodges and Mrs. Givhan?
A No, there wasn't any disturbance, I would say, between those two ladies, Mrs. Hodges and Mrs. Givhan.
Q Now, did you work there also in '71-72?
[154] A Yes, sir.
Q Was Mrs. Hodges also there?
A Yes, she was.
Q Did Mrs. Hodges demonstrate any lack of emotional stability during those years?
A No, she didn't.
Q What was Mrs. Hodges performance during the years 1971-72?
A As Counselor.

BY THE COURT:

Q Were you there during '71 and 72?
A Yes, I was.
Q And you left there at that time?
A Right.

BY MR. BANKS:

Q You say Mrs. Hodges was the Counselor in '70 and 71?
A Yes, she was.
Q What duties did she undertake in 1970-71?
A Well, she—as far as I know, I really don't know. I wasn't a member of the administrative staff.
Q Did you see her carrying out administrative duties?
A Yes, I did.

Q Did she carry out many administrative duties?
A From my standpoint, yes.
[155] Q Did she have any difficulty in carrying out her administrative duties?
A Not to my knowledge she didn't.
Q Did you ever see her break down and cry, or do anything like that?
A No, I didn't.
MR. BANKS: That is all the questions we have.
THE COURT: You may take the witness on cross-examination.

CROSS-EXAMINATION

BY MR. ROBERTSHAW:

Q Mr. Jacob, you were hired in 1970 and '71?
A Right.
Q As a social studies teacher—
A And a coach.
Q —and a coach?
A Yes, sir.
Q And then you were transferred to remedial reading?
A Right.
Q And coaching?
A And coaching.
Q And then the E.S.E.A. ceased to fund physical education?
A I really don't know if they ceased to or not.
[156] Q Well, you were not rehired in 1973-74, were you?
A No, I wasn't.
Q You were there three years?
A I was there three years.
MR. ROBERTSHAW: That is all the questions I have, Your Honor.
THE COURT: All right, you may step down.

(The witness withdrew.)

Call your next witness.

MR. BANKS: We call Sheryle Ann Molette.

AND THEREUPON,

SHERYLE ANN MOLETTE,

called as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. BANKS:

Q Would you state your name?
A Sheryle Ann Molette.
Q Where do you live?
A Glen Allan, Mississippi.
Q Do you attend school?
A Yes, sir. I am a senior this year at Glen Allan High.
[157] Q Are you graduating?
A I will graduate May the 14th.
Q Did you attend school in Glen Allan in 1970-71?
A Yes, sir, I did.
Q What grade were you in?
A Eighth.
Q Do you know Mrs. Bessie Givhan?
A Yes, sir, I do.
Q Was she one of your teachers?
A Yes, sir, she was my English teacher.
Q To your knowledge did Mrs. Givhan discriminate against you because you are white?
A No, sir, she didn't.
Q In grading?
A No, sir, she didn't.
Q To your knowledge did she discriminate against anybody because they were white in her grading?
A No, sir.

Q Have you sensed any racial animosity in Mrs. Givhan?
A Not to me, and not to anybody else that I know of.
Q Were there any disputes between Mrs. Givhan and Mrs. Hodges in the presence of your class?
A Not while I was there. Not in front of me there wasn't.
Q Were there any disputes between Mr. Leach and [158] Mrs. Givhan in the presence of your class?
A No, sir.
Q Was there any class disruption during that year in Mrs. Givhan's class?
A No, sir, none at all.
Q Did Mrs. Givhan seek to get students to protest anything during that year?
A No, sir.
Q Did she ever discuss her differences with the administration of the school district in her class?
A You mean to us students?
Q To her students.
A No, sir.
Q Was there any disturbance of any kind in the classroom when Mrs. Givhan taught you eighth grade English?
A Well, I don't understand.
Q Were there any disputes brought to the attention of the class that maybe interfered with class work, or anything like that?
A No, sir.
Q Did you sign a letter to Mr. Leach and Mr. Morris, Exhibit 2 in this case, with regard to Mrs. Givhan?
A Yes, sir, I did.
Q Were you supporting her retention?
A Yes, sir.
[159] Q Do you still support her retention?
A Yes, sir.

Q Now, the letter also mentions a counselor. Did you have much contact with Mrs. Hodges as an eighth grader?

A Not much because I came to the eighth grade in the second semester. And outside of her assigning my classes and showing me around, that was practically it.

Q Were you there also in the ninth grade?

A Yes, sir.

Q Did you have occasion to come in contact with Mrs. Hodges in the ninth grade?

A Only when she called meetings for the whole class, you know. You know, telling us things that we needed to know.

Q She did call meetings for the ninth grade class?

A I remember once she talked to us about studying, you know, that we should get down to our studying more.

Q This was a ninth grade class?

A Yes.

Q When you say "senior class", you mean in junior high school?

A I don't understand.

Q When you said "the senior class", did you mean the senior class in junior high school or the senior class in senior high school?

A The senior class in junior high school?

[160] Q You said the whole senior class. I wonder what you meant.

A I mean, when she called the class, she talked to us as a whole, and talked to us in the ninth grade that we should study because this is where we pick up our units.

Q This would be a ninth grade class?

A Right.

Q To your knowledge was she carrying on her Counseloring activities when you were in the ninth grade satisfactorily?

A Yes, sir, she was.

MR. BANKS: No further questions, Your Honor.

THE COURT: All right, you may take the witness on cross-examination.

CROSS-EXAMINATION

BY MR. ROBERTSHAW:

Q You were in Mrs. Givhan's English class during 1970 and '71?

A I was in her eighth grade English class. I can't remember quite what year it was, '70 or '71. I can't remember what year it was.

Q But you were in her class at Glen Allan?

A Right.

Q But it was the first year after they reconstituted [161] the district, wasn't it?

A Yes, sir.

Q Were you in that class the whole year?

A No, sir, just a semester.

Q Just one semester?

A Uh-huh.

Q Which semester?

A The second.

Q The second semester?

A Right.

Q And you were not present during the first semester?

A No, sir.

Q Were there ever any meetings of that class from which whites were excluded, white pupils?

A No, sir. None at all.

MR. ROBERTSHAW: All right, thank you.

THE COURT: All right, you may step down. You may be finally discharged.

(The witness withdrew.)

Call your next witness.

MR. BANKS: Janie Carol Lewis, Your Honor.

THE COURT: [162] All right.

AND THEREUPON,

JANIE CAROL LEWIS,

called as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. BANKS:

Q State your full name.
A Janie Carol Lewis.
Q Where do you live?
A Glen Allan, Mississippi.
Q Are you in school?
A Yes.
Q Where?
A Glen Allan.
Q What grade are you in?
A Twelfth.
Q Are you graduating this year?

BY THE COURT:

Q What grade?
A Twelfth.
Q Twelfth?
A Yes.

BY MR. BANKS:

Q Were you at Glen Allan the full year?
[163] A Yes.
Q Were you taught by Mrs. Bessie Givhan?
A Yes.
Q What were you taught by Mrs. Givhan?
A English.
Q Do you know Mrs. Hodges?
A Yes.

Q Was she there also?
A Yes.
Q Were any disputes between Mrs. Hodges and Mrs. Givhan brought to the attention of the class?
A No.
Q Did you witness Mrs. Givhan exhibiting any hostile attitude toward Mr. Leach, the Principal?
A No.
MR. ROBERTSHAW: I object to the leading.
THE COURT: The objection is overruled. I will take into consideration the opportunity she might have had to observe any of it.
I am going to overrule the objection.

BY MR. BANKS:

Q Were there any class disruptions that was caused by any dispute between Mrs. Givhan and the Administrator?
[164] A Not that I can recall.
Q Was there any discrimination on the basis of race in your class?
A No.

BY THE COURT:

Q For the record, now, what is your race?
A Black.
Q You are black?
A Black.
THE COURT: That is for the record. I want the record to show that. And let the record show the previous witness was white.
MR. BANKS: Yes, sir.
Q Did you witness any disputes in the presence of the students between Mr. Leach and Mrs. Hodges or Mrs. Givhan?
A No.

Q Did you sign a letter in support of Mrs. Givhan back in 1971?

A Yes.

Q Did that letter also mention the Counselor? Do you remember it mentioning the Counselor in that letter?

A Yes.

Q Did that refer to Mrs. Hodges?

[165] A Yes.

Q Was that a part of what you were complaining about?

A No.

Q Were you a ninth grader in Glen Allan in 1971-72?

A Yes.

Q Were you counseled by Mrs. Hodges?

A Yes.

Q To your knowledge was she carrying out her counseling duties satisfactorily?

A Yes.

MR. BANKS: Nothing further, Your Honor.

THE COURT: You may take the witness on cross-examination.

CROSS-EXAMINATION

BY MR. ROBERTSHAW:

Q Is it Miss Lewis or Mrs. Lewis?

A Miss.

Q Miss?

A Yes.

Q Miss Lewis, you went to Glen Allan in the fall of '70 and '71?

A I guess so.

Q Well, let me put it this way: Were you in Western Line the year before you went to school in Glen Allan?

[166] A I have been in Western Line ever since the third grade.

Q All right.

BY THE COURT:

Q Before you went to Glen Allan what school were you in attendance?

A Myersville.

Q Where?

A Myersville Elementary.

BY MR. ROBERTSHAW:

Q The year before you entered Glen Allan you went to school at Myersville?

A When you say "Glen Allan", are you speaking in terms of the High School? Because I went to Moore Elementary too.

Q Well, I am speaking of Glen Allan High School in the school year 1970 and '71.

A Yeah.

Q Right. You will recall that was the first year in which the district was reconstituted after all of the high school students had been sent to Riverside?

A Yes.

Q When you first got to Glen Allan High School how would you describe discipline?

A Discipline. Just, you know, like discipline.

[167] BY THE COURT:

Q How did the boys and girls act? Was it bad, or good, or what, or unruly, or what, when you first went there?

A They acted natural.

BY MR. ROBERTSHAW:

Q Beg pardon?

A Natural.

THE COURT: She said they acted just like boys and girls do.

BY MR. ROBERTSHAW:

Yes, sir.

Q Were they in the halls between classes and during classes?

A I don't know, because I was in class myself. How could I watch the halls?

Q Well, were there any problems between the teachers and the students when you first began school there?

A Not that I can recall.

Q None that you can recall?

A (No response.)

MR. ROBERTSHAW: Thank you.

THE COURT: Is there any reason why this witness may not be finally discharged?

[168] MR. BANKS: No, Your Honor.

MR. ROBERTSHAW: No, Your Honor.

THE COURT: All right, you may be discharged. That means you are released from the Rule. You can go wherever you want to.

Call your next witness.

(The witness stepped down.)

MR. BANKS: Your Honor, we have no other testimony. We want some clarification on one of the stipulations.

THE COURT: All right.

MR. BANKS: Could we have stipulation No. 5?

THE COURT: All right. Exhibit No. 5?

MR. BANKS: Exhibit No. 5.

(Document produced by the Clerk, handed to Mr. Banks.)

(Mr. Banks and Mr. Robertshaw conferring off the record.)

[169] MR. BANKS: Your Honor, we would like to get copies of the document which explains some of the codes that are on this document.

THE COURT: All right.

(Copies of a document produced by Mr. Banks provided by the Court.)

MR. BANKS: I would like permission to recall Mrs. Hodges for the sole purpose of explaining something on this document.

THE COURT: All right, come around, Mrs. Hodges.

AND THEREUPON,

DOLLYE W. HODGES,

recalled as a witness on behalf of the plaintiffs, having been previously sworn, testified as follows:

DIRECT EXAMINATION

BY MR. BANKS:

Q Mrs. Hodges, in 1969-70, and I am talking about your certification now, how were you certified?

A I was certified in 1969-70 as an elementary teacher, up until January of 1970.

Q And were you certified as an elementary teacher [170] in '70-71?

A In '70-71 I was certified as a guidance counselor on an 18-hour permit.

Q In '71-72 how were you certified?

A In '71-72 I was certified as a guidance counselor on an AA license?

Q A double-A license?

A A double-A license.

Q What had occurred that caused you to have a double-A license?

A I had received my degree from Mississippi College May 30th, 1971.

Q In 1971?

A Yes, sir.

Q And you had a double-A certificate, which was in guidance counseling?

A My double-A certificate endorsement was in guidance counseling, and I had previously been an elementary major, so "elementary" was on it.

MR. BANKS: I see. Nothing further, Your Honor.

THE COURT: Do you care to ask the witness anything?

MR. ROBERTSHAW: If the Court would indulge me, I think I have a [171] certification here. I would just like to check her responses, then I may have some questions.

THE COURT: All right, sir.

MR. BANKS: I would like to offer this document as an exhibit by stipulation, Your Honor.

THE COURT: All right, let it be received.

(Stipulated Exhibit No. 6 received in evidence.)

CROSS-EXAMINATION

BY MR. ROBERTSHAW:

Q Mrs. Hodges, the effective date of your certification as a guidance counselor was from September the 1st of '70 to August the 31st of '71, is that correct?

A Yes, sir. That is the permit.

Q And during that time you had a class-A certificate?

A Yes, sir.

Q And your class double-A certificate took effect 9-1-71?

A Yes, sir.

Q And is a 10-year certificate?

A Yes, sir.

MR. ROBERTSHAW: Thank you.

[172] MR. BANKS: Nothing further, Your Honor.

THE COURT: Anything else?

MR. BANKS: We would like to withdraw the original tax records of Mrs. Givhan and substitute a copy for those.

THE COURT: All right. Do you have copies?

MR. BANKS: We don't have copies, Your Honor. If I could get copies made.

THE COURT: All right. You may step down.

(The witness stepped down.)

MR. BANKS: With that we rest, Your Honor.

THE COURT: Call the first witness for the defendant.

MR. ROBERTSHAW: We will take Mr. Leach.

THE COURT: All right, Mr. Leach, come around.

AND THEREUPON,

JAMES S. LEACH,

[173] called as a witness on behalf of the defendants, having been previously sworn, testified as follows:

DIRECT EXAMINATION

BY MR. ROBERTSHAW:

Q During the year 1971 and 1972, Mr. Leach, you were Principal of Glen Allan High School?

A Yes, sir.

Q Was one of your duties to prepare evaluation sheets on each teacher?

A Yes, sir.

Q All right, sir, did you prepare an evaluation sheet on Mrs. Hodges?

A Yes, sir.

(Documents produced by Mr. Robertshaw, handed to the witness.)

Q Is that your evalaution sheet on Mrs. Hodges?

A Yes, sir.

MR. ROBERTSHAW: We offer that as an exhibit.
THE COURT: All right, let it be received.
THE CLERK: Defendant's Exhibit No. 12 received into evidence.

(Document produced by Mr. Robertshaw, handed to the witness.)

[174] BY MR. ROBERTSHAW:

Q Who was Assistant Principal during that school year?
A Mr. Givhan.
Q And he worked directly under your supervision and control?
A Yes, sir.
Q All right, sir, did his duties also include the preparation of an evaluation report on teachers?
A Yes, sir.
Q And those were prepared on forms that are used in the normal course of the school's business?
A Yes, sir.
Q Is the document the Marshal has handed you the evaluation by Mr. Givhan for March the 9th of '72?
A Yes, it has his signature on it.
Q That was prepared under your supervision and control?
A Yes, sir.

BY THE COURT:

Q What do you mean, it was prepared under your supervision and control? Did you direct him to make it out in the way it is made out?
A No, sir.
Q What do you mean?
A He made it out. I mean, I asked him to help me [175] evaluate the teachers. I wanted his evaluation and my evaluation also.

Q You requested him to give you an evaluation on a proper form?
A Yes, sir.
THE COURT: All right.
MR. ROBERTSHAW: We offer that as an exhibit.
THE COURT: All right, let it be received.
THE CLERK: Defendants' Exhibit No. 13 received into evidence.

BY MR. ROBERTSHAW:

Q During the school year 1970-71 did you also evaluate Mrs. Givhan?
A Yes, sir.

(Document produced by Mr. Robertshaw, handed to the witness.)

Q The document that the Marshal has handed you, is that your evaluation of Mrs. Givhan as of April the 16th, 1971?
A Yes, sir.
MR. ROBERTSHAW: We offer that as an exhibit.
THE COURT: [176] Let it be received.
THE CLERK: Defendants' Exhibit No. 14 received into evidence.
MR. ROBERTSHAW: We have no further questions.
THE COURT: All right, you may take the witness on cross-examination.
MR. BANKS: No questions.
MR. ROBERTSHAW: Excuse me, Judge. There is something in the back of my mind. Would you indulge me for just a second, because it is something I need to bring out from this witness.
THE COURT: All right, sir.
MR. ROBERTSHAW: May I request that he be released and I have the opportunity to put him back on for a limited purpose?
I frankly can't recall, but I do think it is important.

THE COURT: All right, you may have that right.

All right, you may cross-examine the witness.

[177] MR. BANKS: Your Honor, before I cross-examine the witness, may I see Exhibit 13?

THE COURT: All right, sir.

(Examined by Mr. Banks.)

MR. BANKS: No questions.

THE COURT: All right, you may step down, with the right to recall him for that additional purpose.

MR. ROBERTSHAW: Thank you, Your Honor.

THE COURT: All right, call your next witness.

MR. ROBERTSHAW: I take Mr. Hiram Cochran.

AND THEREUPON,

HIRAM T. COCHRAN,

called as a witness by the defendants, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. ROBERTSHAW:

Q Would you state your name, please?

A Hiram T. Cochran.

[178] Q How old are you, Mr. Cochran?

A Sixty-two years old.

Q Are you a member of the Board of Trustees of Western Line Consolidated School District?

A I am.

Q And for how long have you been a member?

A Since it was organized.

Q Do you recall what year that was?

A I believe it was 1954. I am not real sure about that date, but it was thereabouts.

Q And you are President of the Board?

A At present I am, yes.

Q And how long have you been President?

BY THE COURT:

Q Were you duly elected?

A Yes, sir.

Q In the general election last year?

A Yes, sir.

THE COURT: All right. That is what I thought. I just wanted to be sure.

MR. ROBERTSON: Sir?

THE COURT: I said I wanted to be sure of my interpretation [179] of the manner in which he received his position throughout the years.

It is an elected position as distinguished from an appointed position by the Board of Aldermen or by the Board of Supervisors, or someone on the Board?

MR. ROBERTSHAW: Yes, sir.

Q Western Line is a line consolidated school district?

A Right.

Q And one Trustee is elected each five years?

A Right.

Q Except to fill vacancies.

A That is correct.

Q And you were elected by the people of the entire district, is that correct?

A That is right, except the part that lies in Issaquena County.

Q I see. And they elect one of the five Trustees?

A Right.

Q You are also President of the Board of Trustees?

A That is right.

Q And how long have you been President of the Board of Trustees?

A I am not real sure, but it has been, oh, I think in the neighborhood of about fifteen years, I believe.

[180] Q You have been back behind 1966 anyhow?

A Thereabouts. 1960, yes, sir.

Q Do you recall the order that was entered in this cause on January the 2nd, 1970?

A By this Court?

Q Yes, sir.

A Yes, sir.

Q And pursuant to that order what was done? How was the District constituted?

A Well, if I remember, the thing that happened on that date, we had a period there of—I don't remember if it was a week or two weeks—that we didn't have any school to get our school system reorganized. And we moved the teachers around and the children around to where we felt that they would coincide with the orders of the Court. And, presumably, they did because the way we did it that time, so far as I know, was accepted by this Court.

Q Well, in accordance with the Court's directive all of the high school pupils were put at Riverside, were they not?

A That is right.

Q And all of the elementary students were put at O'Bannon or Glen Allan?

A That is correct.

Q Depending upon where they lived?

[181] A That is right, according to where they lived.

Q What kind of a situation did we wind up with at Riverside?

A Well, for the rest of that semester we had a situation that was, oh, it was pretty rough, as I can remember, so far as discipline is concerned. We had three communities that had gathered in one place and there was friction, it seems to me, as much between the blacks and the blacks as there was between the whites and the blacks. But there was kind of a state of unrest among the whole student body there the rest of that year.

Q And in that summer, by agreement with the plaintiffs, we entered a new order that set up an attendance zone system?

A Right.

Q So that we would have a complete attendance center at O'Bannon, Riverside and at Glen Allan?

A That is right. We had three complete attendance centers.

BY THE COURT:

Q You mean all grades?

A Yes, sir.

Q All grades, one through twelve?

A Yes.

MR. ROBERTSHAW: Grades one through twelve at each center, yes.

[182] THE COURT: All right.

BY MR. ROBERTSHAW:

Q And when was the District so reconstituted, at the beginning of what school year?

A I believe that was at the beginning of the 1970-71 school year.

BY THE COURT:

Q '70 and '71?

MR. ROBERTSHAW: '70-71, yes, sir.

A I believe the latter part of '70 we were complying with the Court's order. '70 and '71 was a new year, and we had had this last semester with the school center at Riverside which didn't work out satisfactorily to anybody, I don't think.

BY MR. ROBERTSHAW:

Q Now, since the opening of the school year 1970 and '71, what problems have we had with maintaining desegregated schools?

A Well, it seems to me that discipline is one of the problems with the children. And of course we have had some problems with teachers. To begin with the teachers had to be moved around to comply with the Court order. Maybe they were living in one town and had to work in another. That wasn't very satisfactory to them.

[183] But since then, in the last two or three years, I feel like our whole school system is upgraded considerably from what it was at the time that we first integrated our schools. It seems that our discipline is better and the acceptance of our blacks accepting the whites and the whites accepting the blacks has improved, oh, I would say a hundred percent better than it was to begin with.

Q All right, sir. Now, since the beginning of the 1970-71 school year students have been assigned to a school depending upon where they lived, is that correct?

A That is correct.

Q And what control has been maintained over zone jumping?

A Well, we had a problem with that for a while, but so far as I know it has been corrected in the last two years, I believe.

Q All right, sir. So what influence does the race of the pupil have upon his assignment?

A Not any.

Q All right, sir. Now, with reference to teachers, what influence has race had since 1970 and '71 upon the assignment of teachers?

A Well, it had to have enough influence upon us that we had to keep in mind the order that we had from this Court, in that we would be in compliance with it, and also trying [184] to find the teachers that would fit into the places where they were needed and still be in compliance with the order of the Court, which, it wasn't an easy problem, especially to begin with. There was insubordination, lack of cooperation, and it looked like

everything that could bother a school system was bothering us there for, oh, I don't know, maybe—seems to me like about three, maybe four years. Well, it was about two years, maybe, that things began to show some improvement.

Q In other words, what you are telling us is that after the first year—

MR. BANKS: Objection. Leading, Your Honor.

THE COURT: Well, the objection is overruled. It is leading, I will have to acknowledge that, but for the purpose of going along with the evidence in the case, I think if it is suggestive enough to direct his testimony in the case I will sustain it, but if it is just a presentation to the Court of what has happened, I am going to overrule.

Go ahead, but try not to lead him as much as you can.

MR. ROBERTSHAW: I will withdraw the question.

THE COURT: All right. I know it is a little bit easier to [185] lead him, and we will get through quicker, but then ask him the questions according to the rules, if you will.

BY MR. ROBERTSHAW:

Q Would it be fair to describe—

THE COURT: Why don't you ask him how he would describe it or something like that and let him say how it is done.

BY MR. ROBERTSHAW:

Q How would you compare the situation in the second semester of 1969 and '70 with the school year '70-71?

A Oh, it has improved a good deal from the first part of '70, between that semester of '70 and '71.

Q All right, sir.

A But we still had problems.

BY THE COURT:

Q In other words, it improved beginning with the school year '70-71? After the spring and early summer of 1970, that fall and that winter, it improved to some extent, is that what you are saying?

A Yes, sir.

Q But you still had problems?

A Yes, sir.

THE COURT: All right, sir.

BY MR. ROBERTSHAW:

[186] Q And what progress was made during '71-72?

A Well, we began to find the things that exist in any new organization that involved as many people as there are involved in a school district, and the number of schools and the number of teachers in our district. There had to be a number of things that we had to get corrected since our organization. And, as we began to find those things and correct them and get the people in the places where they worked the best, why things began to improve.

Q All right, sir. Now, directing your attention to the time when Mrs. Givhan's name came up for recommendation or not recommendation, do you recall that meeting of the Board?

A Yes, I do.

Q What recommendation did you receive from the Principal regarding Mrs. Givhan?

THE COURT: How about from the Superintendent? Wouldn't he be the person that would recommend it to the Board, rather than the Principal?

MR. ROBERTSHAW: It is done at that level.

THE COURT: I understand, but it never got to the Board. The Superintendent didn't make it.

[187] BY MR. ROBERTSHAW:

Q All right, sir, what recommendation did you get from the Superintendent?

A For the rehiring of Mrs. Givhan?

Q Yes, sir.

A For the school year of '70 and '71?

Q No, sir, for the school year of '71 and '72.

A '71 and '72, she was not recommended.

Q All right, sir. Now, in pondering the question of whether to accept or reject the Superintendent's recommendation, what factors did you as a member of the Board discuss with the other members?

A Well,—

THE COURT: Mr. Robertshaw, did the Board have anything to do with this situation, if a teacher is not recommended? The Board can't hire a teacher unless that teacher is recommended by the Superintendent. The Superintendent has to have the recommendation from the Principal, doesn't he, under State law; isn't that the way it works?

MR. ROBERTSHAW: As I understand the State law, the Board has a right to accept or reject the recommendation of the Superintendent.

THE COURT: [188] If the recommendation is made. But here there wasn't any recommendation made to employ this person. They just didn't get it. They just didn't get around to it because there wasn't any recommendation made.

MR. ROBERTSHAW: I think, if the Court please, the way it is worked is that the Board goes into executive session and then considers the teachers that are not to be tendered new contracts.

THE COURT: That may be true, but I didn't know that was the law.

MR. ROBERTSHAW: Let me bring that out.

Q How does the Board act on teachers who are not recommended for rehiring?

A The Board will go into executive session, because that is discussing personal things about individuals. And we review the reasons why the Superintendent did not recommend the rehiring of this person. And after that review is over, after we have had some discussion about it, why then the Board comes to some conclusion as to whether or not this person will be rehired.

BY THE COURT:

Q Even though they are not recommended by the [189] Principal of the school; do you consider rehiring people who are not recommended by the Principal himself? Does the Board consider overruling the Principal and the Superintendent of the school when a recommendation is not made to the Board, to go into executive session and overrule them and hire them anyway if you want to?

A No, sir, we have not, Your Honor. But I have always felt that we had that privilege to do that if we saw the facts that pointed in that direction, that this was maybe a capable person and was a person that we should keep in our employ. That there might possibly be some prejudice between the Superintendent and this individual that had come before us.

And we never rehired her, but at the same time we never, as I can remember, it was never where we felt there was anything personal between the teacher and the Superintendent, or the teacher and the Principal, for the reason that they were not recommended. That it was always some good and just reason for not rehiring a person.

Q In other words, what you are saying to the Court is that you counsel with your Superintendent over his decision—

A Right.

Q —not to recommend—

A Yes, sir.

[190] Q —to see whether or not he might be led into the position, that he has made a mistake in the matter?

A That is right.

Q All right.

A That is exactly right, sir.

BY MR. ROBERTSHAW:

Q Is that procedure followed in the case of each teacher who is not tendered a contract for the new year, excepting those that resign or die, of course?

A To the best of my knowledge, it is. I don't remember an instance where it wasn't.

Q All right, sir. Was such a procedure followed in the case of Mrs. Givhan?

A Right.

Q Can you tell the Court, please, what factors you considered in counseling with the Superintendent and reaching a decision on Mrs. Givhan?

A Well, we came to a final decision that we would accept our Superintendent's recommendation. And I think our decision was based on actions that had been taking place from time to time, things that came to the knowledge of the Board. Sometimes maybe things that shouldn't have. But, anyway, as members of the Board we would hear rumors about it and we were concerned about it, about how the schools were getting along.

And at that time, if I remember right, there was [191] a lot of rumors going in every direction.

Q All right, sir.

A And Mrs. Givhan had been—her name had been mentioned in Board meetings before the time of the rehiring of the teachers. So, we had heard that maybe before, and some things that have been mentioned here in court, and maybe some others too.

BY THE COURT:

Q Did you give her an opportunity to listen to what was said against her, give her a hearing on that, or did you just take the rumors as being true?

A Your Honor, if I remember the situation as it occurred at that time, that when we didn't rehire Mrs. Givhan she asked the Board why, she wanted to know why. All right, we advised Mr. Morris to get in contact with Mrs. Givhan and ask her if she cared for us making those reasons public. And, if I remember correctly, she said that she did not, that she would meet with us. And we gave her the reasons.

Q Did you have any personal contact with her?

A No, sir, I did not.

Q It was all handled through Mr. Morris or some other party?

A The best that I can remember, it was.

THE COURT: All right.

[192] BY MR. ROBERTSHAW:

Q Specifically, at the time you were acting on Mrs. Givhan's contract, did the Board have knowledge of the incident at O'Bannon in the fall of 1970, or '69?

A You are talking about the meeting?

MR. BANKS: Objection to that. It is too broad. I don't know what he is talking about.

THE COURT: I don't either. I am going to let him answer it, if he can come up with an answer to it without asking his lawyer. The objection is overruled to the question. He can answer it, if he can.

BY THE COURT:

Q Do you recall the incident in the fall of '69 that came to the attention of the Board about Mrs. Givhan?

A Except the one that was mentioned here in court earlier.

Q What was that?

A Practically the same thing that the Court heard, that there was a meeting, the meeting was disrupted and the purpose of it was not fulfilled.

Q Was that in the fall of '69?

A Well, it was between the '69 and '70 year, there at the time that we were moving the teachers from one school [193] to the other to get the balance the Court had asked for.

THE COURT: All right, you may proceed.

BY MR. ROBERTSHAW:

Q Now, between the time of the order of January the 7th and the reopening of school on February the 2nd, can you tell us whether or not the members of the Board were aware of the meeting that was held by the O'Bannon teachers and the question as to whether or not they were going to come to work?

A I wasn't aware of it.

MR. BANKS: There has been no testimony there was such a meeting.

THE COURT: The objection is overruled. I think his answer is going to clear it up anyhow. Go ahead and answer the question.

A I wasn't aware of the meeting before it occurred, but Mr. Morris informed me of it.

THE COURT: I am going to sustain the objection to it on the grounds of hearsay, that he heard, rumors he heard, and things of that nature. That is all hearsay testimony.

MR. ROBERTSHAW: [194] Yes, sir. Now, if the Court please, I would like to ask about a point, because the only way the Board gets information is through reports made to it by the Superintendent at its meetings and the communications that are received in the normal course of business.

THE COURT: Mr. Robertshaw, I don't believe that in this case you are going to get by the recommendation of the Principal here, to get into what the Board did on rumors that they heard and reports that was made to it by the Superintendent, and things of that nature that this party didn't have any opportunity to refute or to answer, or anything else.

MR. ROBERTSHAW: All right, sir.

THE COURT: You may make a record on it if you want to, but I am going to sustain the objection to it.

If you want the benefit of it on appeal, you may ask him. Make a record on what you want to say, what he wants to testify to.

MR. ROBERTSHAW: I don't think so, if the Court please. Our difficulty is that—

[195] Is that Mr. Morris is not here, I understand.

MR. ROBERTSHAW: Yes. And everything a Board does is on hearsay.

They are sitting in a quasi-legislative function.

THE COURT: I don't agree that everything a Board does is on hearsay, and that the Board can just take rumors without giving the party an opportunity to respond to them and act upon them. That is foreign to me from a due process standpoint.

I don't think you can adjudicate the rights a person might have on the proposition of what somebody comes to you and tells you, or a rumor around the community.

Anything positively this gentleman knows about it, he can testify to, or anything shown on the minutes of the Board, or anything shown in the records of the school. But just to reach out into the community and get hearsay rumors, I don't believe that is competent.

MR. ROBERTSHAW: If the Court please, could we take the afternoon recess at this time and let me go through the Minute Book? I believe some of these communications are in that Minute Book.

THE COURT: [196] All right. We will be in recess now for fifteen minutes.

(Court in recess from 3:35 p.m. until 3:50 p.m. The trial then resumed in open court.)

THE COURT: Be seated, please.

MR. ROBERTSHAW: If the Court please, may we get a couple of pages copied?

THE COURT: Yes, sir.

(Photographic copies of documents provided by the Court.)

BY MR. ROBERTSHAW:

Q Mr. Cochran, do you know whether or not a letter was received from Mrs. Givhan requesting the reason for her dismissal?

A Yes, sir, it came to the attention of the Board.

(Document produced by Mr. Robertshaw, handed to the witness.)

Q Is that the letter?

A Just a moment. (Examined) Yes, it is.

THE COURT: He says it is.

MR. ROBERTSHAW: [197] We offer that as an exhibit.

THE COURT: All right, let it be received in evidence.

THE CLERK: Defendants' Exhibit No. 15 received into evidence.

BY MR. ROBERTSHAW:

Q Do you know whether a reply was made?

A Yes, it was.

Q Would you examine this and see if this is the reply?

(Document produced by Mr. Robertshaw, handed to the witness.)

A (Examined) It is.

MR. ROBERTSHAW: We offer that as an exhibit.

THE COURT: All right, let it be received.

THE CLERK: Defendants' Exhibit No. 16 received into evidence.

(Document produced by Mr. Robertshaw, handed to the witness.)

BY MR. ROBERTSHAW:

Q Now, Mr. Cochran, you are now examining a reproduction of page 130 of the Minute Book of Western Line Consolidated School District, the minutes of a meeting held [198] I believe on July the 8th.

A Right.

Q You were present at that meeting?

A Right.

Q Could you read this paragraph, please (Pointing)?

A (Reading) Mr. Guy Storm and Mr. Clarence Hall, representing the Glen Allan P.T.A., stated that the P.T.A. at a meeting May the 25th—

MR. BANKS: Objection, Your Honor.

THE COURT: Just a moment.

MR. ROBERTSHAW: It is being reproduced.

THE COURT: It is an excerpt from the Minutes of the Board of Trustees of Western Line Consolidated School District. I don't know whether it constitutes hearsay evidence or not. I will let him read it then I will rule on it—rule on your objection to it.

THE WITNESS: Do you want me to start over?

THE COURT: Yes, sir, start over and read it.

A (Reading) Mr. Guy Storm and Mr. Clarence Hall, [199] representing the Glen Allan P.T.A., stated that the P.T.A. at a meeting May the 25th had voted to ask the Board of Trustees to consider giving Mrs. Bessie B. Givhan a contract. They were told that the Board did not feel that it should rehire Mrs. Givhan because of various

actions. Mr. Hall suggested that if the facts were given the P.T.A. might reconsider their request. He suggested that Mrs. Givhan be written a letter asking for permission to let the public know the reasons. Mr. Morris was instructed to write Mrs. Givhan.

That is the end of that paragraph.

BY MR. ROBERTSHAW:

Q All right, sir, was such a letter written?

A It was.

(Document produced by Mr. Robertshaw, handed to the witness.)

Q Is that a copy of the letter?

A (Examined)

THE COURT: It is the letter, I guess, signed by Mr. Morris and not by this witness.

A Right. This is the letter that we instructed Mr. Morris to write.

BY THE COURT:

Q Did you take it out of the files of the School District? Did you, Mr. Robertshaw?

[200] MR. ROBERTSHAW: Yes, sir. It was taken out of the personnel file of Mrs. Bessie B. Givhan. And copies have previously been furnished, at least they have inspected a copy of it.

THE COURT: Do you have the personnel file here?

MR. ROBERTSHAW: Sir?

THE COURT: Do you have the personnel file here?

MR. ROBERTSHAW: Yes, sir.

THE COURT: I just wanted to know if it is available. I haven't seen it. I don't know what is in it. I didn't know whether you are going to introduce what is it in or not.

Go ahead. I just wanted to know if it was here.

MR. ROBERTSHAW: We offer that as an exhibit.

THE WITNESS: Do you want me to read this?
MR. ROBERTSHAW: No, sir.
[201] THE COURT: No, it speaks for itself.
MR. ROBERTSHAW: We will offer it in evidence.
THE COURT: Any objection?
MR. BANKS: I don't know what letter he is talking about yet, Your Honor.
THE COURT: Show him the letter.

(Documents tendered to and examined by counsel for the plaintiffs.)

Any objection?
MR. BANKS: No, Your Honor.
THE COURT: All right, let it be received.
THE CLERK: Defendants' Exhibit No. 17 received into evidence.
THE COURT: Go ahead.

BY MR. ROBERTSHAW:

Q Do you know whether a response was made to that letter?
[202] A It was.

(Document produced by Mr. Robertshaw, handed to the witness.)

A (Examined) This is it, the response.
MR. ROBERTSHAW: We offer that as Exhibit 18.
THE COURT: All right, show it to counsel.

(Document tendered to and examined by counsel for plaintiffs.)

THE COURT: Let it be received.
THE CLERK: Defendant's Exhibit No. 18 received into evidence.

(Document produced by Mr. Robertshaw, handed to the witness.)

BY MR. ROBERTSHAW:

Q Now, I have handed you a copy of a letter dated July the 14th. Is that the response to Mrs. Givhan's letter?
A This letter is dated July the 28th.
Q The 28th?
A And it is in response to a letter dated July the 14th.
MR. ROBERTSHAW: We offer that as Exhibit 19.
[203] THE COURT: All right, let it be shown to counsel, if counsel hasn't already seen it.
MR. ROBERTSHAW: Counsel has a copy.
MR. BANKS: No objection.
THE COURT: Let it be received.
THE CLERK: Defendants' Exhibit No. 19 received into evidence.
THE COURT: All right, you may go ahead.

BY MR. ROBERTSHAW:

Q Now, other than that correspondence, do you know of any other written communication between the District and Mrs. Givhan relating to her failure to be rehired?
A Not that I can recall.
Q To your knowledge has she ever requested a hearing before the Board?
A Not to my knowledge.
Q During the period that you have been a member of the Board has any request for a hearing before the Board to your knowledge been denied?
A No, there hasn't. Not to my knowledge.
[204] THE COURT: If they haven't received one, I don't guess they could deny it.
MR. ROBERTSHAW: Sir?
THE COURT: I say, I guess if he hasn't received a request for a hearing it would go without saying that he hasn't denied such a request, since he never received it.

MR. ROBERTSHAW: No, sir. My question was has any request for a hearing been received by the Board.

THE COURT: And he said not that he knew of.

MR. ROBERTSHAW: That is correct.

THE COURT: Then you asked him if any such request had been denied, and I say that answers itself.

MR. ROBERTSHAW: I am sorry, if the Court please. It is late in the day.

THE COURT: If he didn't get a request, how can he deny it?

MR. ROBERTSHAW: [205] Right.

THE COURT: Go ahead.

MR. ROBERTSHAW: I think I made it clear, one, that Mrs. Givhan has never requested a hearing.

THE COURT: Yes, sir.

MR. ROBERTSHAW: And, second, that no request for any hearing has ever been denied by the Board since he has been a member of it.

THE COURT: All right.

BY MR. ROBERTSHAW:

Q Now, the minutes that are being copied, page 131, simply state that the letter which is Exhibit—

THE COURT: I think I have it here. Did I give it back to you, Madam Clerk?

MR. ROBERTSHAW: No, sir, it is Exhibit 18. And it was read to the Board.

THE COURT: All right.

[206] MR. ROBERTSHAW: And we would like to, lest I forget it, simply introduce that page, when it is returned by the Crier.

THE COURT: All right, let it be received, Madam Clerk, when it gets back get it and receive it into evidence.

(Defendants' Exhibit No. 18 received in evidence.)

THE CLERK: Yes, sir.

BY MR. ROBERTSHAW:

Q Mr. Cochran, directing your attention to the failure to rehire Mrs. Hodges. Was the Board later given a copy of the application by Mrs. Hodges to Atlanta University?

A I believe we were.

Q All right, sir, what effect if any would Mrs. Hodges' act have in your mind as a member of the Board upon her qualifications as a Counselor?

A Well, I think it would have an adverse effect, so far as thinking of her being a person that would be the Counselor.

THE COURT: I am sorry, Mr. Robertshaw, but I can't consider that, after the act had already been completed and she had not been rehired.

There is no objection on the part of counsel for [207] the plaintiffs in the case. But I think on my own initiative, I want to announce to you I cannot consider things that happened after the Board decided that there wouldn't be any reemployment.

I have to act upon evidence that the Board had before them at the time the decision was made.

BY MR. ROBERTSHAW:

Q After this information had come to the attention of the Board, do you know whether or not Mrs. Hodges reapplied for the job of counselor?

A Later she did.

THE COURT: Now, I want to know how he knew that she had reapplied for that position. She ordinarily would reapply to the Superintendent or to the Principal and not to the Chairman of the Board.

Now, if he has any personal knowledge of it, of course he can testify to it. But if he has knowledge from hearsay or what somebody has told him, of course it is clearly incompetent and hearsay testimony. So, let's find out what knowledge he has in such reapplication or application for reemployment.

BY MR. ROBERTSHAW:

Q What knowledge do you have as a member of the Board of this application, Mr. Cochran?

[208] THE COURT: Personal knowledge.

Q Personal knowledge.

A Well, I don't remember if it was Mrs. Hodges or who made the statement that she was refused employment in November, I mean, the early part—

MR. BANKS: He is not testifying from personal knowledge, Your Honor.

THE COURT: Yes, unless he can state that he knows, that Mrs. Hodges made that statement to him, I won't permit that testimony to come in.

If he talked to Mrs. Hodges and Mrs. Hodges told him that she had made an application to be reemployed and she was not reemployed, I will permit him to testify to it.

BY MR. ROBERTSHAW:

Q Did she make any statement to you or such a request to you?

A She did not, not to me directly.

Q All right, do you know to whom she did make such a request?

A Mr. Morris.

MR. BANKS: [209] That is again hearsay.

THE COURT: Yes, sir, objection sustained. If you have any written application in the file, Mr. Robertshaw, or anything to indicate from the records, you can produce that as a business record and I will consider it. But, then, I can't consider the hearsay evidence about a matter so important.

MR. ROBERTSHAW: We tender the witness.

THE COURT: You may take the witness on cross-examination.

CROSS-EXAMINATION

BY MR. BANKS:

Q Mr. Cochran, how long have you been President of the School Board?

A Oh, it must be somewhere in the neighborhood of fifteen years or thereabouts. I am not real sure as to the exact year.

Q You have been President for fifteen years?

A Thereabouts.

Q You made the statement that you made an attempt to follow the Court's order regarding faculty assignments; is that your statement?

A I believe I did make that statement.

[210] THE COURT: Just a minute. Make the announcement about that last exhibit, please, ma'am.

THE CLERK: Defendants' Exhibit No. 20 received into evidence.

THE COURT: All right.

BY MR. BANKS:

Q The Court's order instructed you to assign the faculty in the school district so that the ratio at each school would reflect the ratio of the faculty as a whole, did it not?

A I believe that is correct.

Q For the year 1974-75, isn't it true that at Glen Allan school there were 17 black faculty members and 13 white faculty members?

A I have no idea.

BY THE COURT:

Q Do you want to get the records to look at?

A I wouldn't want to make the answer without the records. I don't know.

MR. BANKS: Okay.

THE COURT: Do you have the last report on the School District?

[211] MR. BANKS: Yes, Your Honor.

(Document handed to the witness.)

BY MR. BANKS:

Q I show you the report to the Court dated October 15, 1974.

A I don't see any date on this.

Q Isn't it on the last page?

A Is it 1974 we are talking about?

THE COURT: Yes, sir.

MR. BANKS: Yes, sir.

THE COURT: I believe the only date you can see is on the back page of it. It has got Mr. Robertshaw's certificate on October 15, 1974, and it was filed on October the 16th, 1974.

BY MR. BANKS:

Q Is that a report that was submitted by the defendants in this cause by Mr. Robertshaw in your behalf?

A Correct.

Q You don't have any doubt about the accuracy of the report?

A Beg pardon.

[212] Q You don't doubt the accuracy of that report any way, do you?

A No, I don't doubt the accuracy of this report.

Q Does that report show you have 38 white teachers and 15 black teachers at Riverside?

A (Examined)

THE COURT: What is your question, now?

MR. BANKS: That there are 38 white teachers and 15 black teachers at Riverside, Your Honor. I asked him if that report reflects that fact.

A No, this report don't show that; not as I interpret it.

Q What does it show with regard to white teachers at Riverside?

A Well, it starts out, "Principal, Assistant Principal, Elementary Principal, Special Ed. Supervisor, Teachers, Special Ed. Teachers, Study Hall".

Q Does it have Special—

THE COURT: Don't interrupt him while he is talking.

MR. BANKS: I'm sorry.

A (Resumed) And the total of that is, white 32 and [213] one-half, and the total black is 15 and a half at the Riverside School.

BY MR. BANKS:

Q All right. And the report also shows that you have a total staff and faculty at O'Bannon School of 42 black and how many white?

A 14 and a half. And 42 black is correct.

MR. BANKS: Your Honor, I would like to have that page from the report to the Court marked and submitted as evidence.

THE COURT: All right, let it be received.

THE CLERK: Defendant's Exhibit No. 21 received into evidence.

BY MR. BANKS:

Q Mr. Cochran, going back to 1969, when you heard about a meeting over at the O'Bannon School, wasn't that meeting occasioned by the failure of your School Board to assign faculty members to the O'Bannon School?

A I am a little bit confused about that date 1969. I believe we got the order in January, was it not?

THE COURT: Of '70.

THE WITNESS: Sir?

[214] THE COURT: Of '70.

THE WITNESS: We are talking about the '69 and '70 school year, or the '70 and '71 school year.

BY MR. BANKS:

Q Do you recall the previous order in the summer of 1969 which required you to assign a certain number of white faculty to black schools and a certain number of black faculty to white schools?

A Yes.

Q Do you recall assigning two black faculty members from O'Bannon to Riverside?

A Yes.

Q Do you recall assigning any white faculty member from Riverside to O'Bannon?

A Not at the moment, I do not.

Q Isn't it a fact that the Board refused to require white faculty members to go to black schools?

A The Board did not refuse. The Board tried. If we didn't have them up there as the Court instructed us to, we tried.

Q Did the Board fire any white teachers for refusing to take an assignment in a black school?

A Not that I remember. It is possible that they did, [215] but I don't remember it.

Q Did the white teachers refuse to take an assignment in black schools?

A Possibly some of them could have. But in doing it, we didn't fire any of them to my knowledge. We lost teachers, white and black during that period.

MR. BANKS: I don't think I have anything further, Your Honor.

THE COURT: Is there anything on redirect?

MR. ROBERTSHAW: Nothing further.

THE COURT: You may step down.

THE WITNESS: Your Honor, if I may, I would like to make one statement that might clarify some of the actions the Board has taken.

THE COURT: All right.

THE WITNESS: I made the statement earlier, or I mentioned the fact that the Board had heard rumors, and gossip, and talk, and so on and so forth. That was one of the reasons for the extended year that the Board had [216] considering the rehiring of Mrs. Givhan, in that we might evaluate first hand the actual reasons that we had to confront ourselves with, to take the action that we had taken.

It wasn't because of the rumors, but rumors created a desire on our part to get on down into the thing a little bit deeper and then we would know a little fuller about the things that were happening. Because we felt compelled, if we could, to keep the black teachers. Because we felt more or less that if we didn't keep them that they might could find or would find some way to construe it into a fact that we had discriminated against them because they were black. And, actually, we were bending over backwards trying to keep that thing from happening.

But in the face of our thinking, and in face of the evidence put before us, the actions that you have heard here today, is the result of our decision at the time.

THE COURT: All right, thank you, sir.

Anything further?

MR. BANKS: One more question.

THE COURT: [217] All right.

BY MR. BANKS:

Q Mr. Cochran, Riverside is a majority white school?

A Right.

Q It is the only majority white school in your district?

A Right.

BY THE COURT:

Q Is it a majority white school now?

A Yes, sir. Wait just a minute.

Q Well, I guess the report shows it?

A Yes, sir. There are more whites there than there are in either of the other schools. The majority, I am not sure which is a majority. I believe the black are in the majority.

Q All three schools now are grades one through twelve?

A Right.

Q And there are zones for that particular space?

A Yes, sir.

THE COURT: All right.

MR. BANKS: I would like to introduce the entire document, the entire report.

[218] THE COURT: Let the entire report be introduced.

MR. BANKS: Instead of just one page.

THE COURT: All right.

MR. BANKS: And that is all, Your Honor.

THE COURT: All right. All right, thank you, Mr. Cochran. You may step down.

(The witness stepped down.)

MR. ROBERTSHAW: We will take Mr. Adams.

THE COURT: All right, come around Mr. Adams.

AND THEREUPON,

HAROLD ADAMS,

called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. ROBERTSHAW:

Q Would you state your name, please?

A Harold Adams.

Q What is your occupation?

[219] A Superintendent of Western Line School District.

Q And when did you become Superintendent?

A I became Superintendent in January of '73. I believe that is correct.

Q When were you first employed by Western Line?

A January of '72.

Q And in what capacity?

A As Assistant Superintendent.

Q Now, in the spring of '73, were you present in the administration building when Mrs. Hodges came to make a request on Mr. Morris?

A I don't believe it was the spring of '73, because I believe in the spring of '73 Mr. Morris had retired. But the time that you are talking about, I was in the administrative building. I don't remember the date. But, she did come by to talk to Mr. Morris about a job. And Mr. Morris called me in, and I was there when Mr. Morris talked to her.

Q Now, was that before or after the action had been taken failing to rehire her?

A That was afterwards.

Q All right, was it before or after the end of that school year?

A The best of my knowledge it was after that school year, the end of that school year.

Q All right, sir, for what purpose did Mrs. Hodges [220] come to see Mr. Morris?

A To ask him wouldn't he give her a job.

Q All right, were you present when the discussion between Mrs. Hodges and Mr. Morris took place?

A I was present during part of the discussion anyway, because he had called me in to be in there when he was talking to her—Mrs. Hodges.

Q All right, will you relate to the Court that part at which you were present with both Mrs. Hodges and Mr. Morris?

A I was there when Mrs. Hodges was talking to him about a job, and he asked me to go and get her folder. And he pulled out and showed her this correspondence from Atlanta University, I believe it was, and told her he would not consider reemploying her.

MR. ROBERTSHAW: Would you indulge me just a moment?

THE COURT: Yes, sir.

(Mr. Robertshaw conferring with the Clerk off the record.)

MR. ROBERTSHAW: I will ask the Marshal to hand the witness Exhibits 5 and 6.

(Handed to the witness.)

THE WITNESS: [221] These are the ones that came from her folder.

BY MR. ROBERTSHAW:

Q And these are the ones that Mr. Morris showed her?

A These are the ones, right.

Q And gave her as a reason for not rehiring her?

THE COURT: Don't lead him, now, Mr. Robertshaw. Let him testify.

MR. ROBERTSHAW: Yes, sir.

A He did ask me to go get her folder. He pulled these out and handed them to her and told her that he would not consider rehiring her.

MR. ROBERTSHAW: We tender the witness.

THE COURT: All right, you may take the witness on cross-examination.

CROSS-EXAMINATION

BY MR. BANKS:

Q Mr. Adams, you were employed by the School District in January of 1972?

A January of '72.

Q At that time how many counselors were there in the District?

[222] A At that time there was one counselor.

Q All right, when was the decision made to go to one counselor districtwide?

A When we employed a counselor for the fall. Now, the date, I don't remember, but I imagine it was in March or April, something like that. We decided to use one for the whole district.

Q In March or April of 1972?

A That is correct.

Q And what is the name of that counselor?

A Tony Cintgran—C-I-N-T-G-R-A-N.

Q What is his race?

A Beg pardon?

Q What is his race?

A I didn't understand you.

Q What race is he?

A Oh, he is white.

Q How long has he been the counselor? Is he still the counselor?

A He is still the counselor.

Q He is the counselor for all three schools?

A All three schools in the district.

Q No individual school in the district has a counselor?

A That is correct.

[223] Q Who made that decision to go to districtwide counseling?

A Mr. Morris.

MR. BANKS: I don't think I have anything further, Your Honor.

THE COURT: Anything further?

MR. ROBERTSHAW: Defendants rest.

BY THE COURT:

I want to ask him one or two questions about this matter here that is not quite straight in my mind, about when Mrs. Hodges came back and made this application for reemployment.

Q You did not become Superintendent of the schools—

A Until '73.

Q —until January of '73?

A That is correct.

Q So in 1972 you were with the school district?

A That is correct.

Q As an Assistant Superintendent?

A That is correct.

Q Now, was Mrs. Hodges on the faculty at that time?

A She was on the faculty at the time I began working.

[224] Q Was she on the faculty at the time she came in to see Mr. Morris about reemployment?

A Judge, the best of my knowledge, this was in the summertime when she came and asked Mr. Morris about that.

Q Of 1972?

A Of 1972. To the best of my knowledge it was after school was out. I could be mistaken on the time.

Q She had already been discharged at that time, hadn't she?

A She had not been reelected back, that is correct.

Q For that year?

A For the following year.

Q For the following year?

A Yes, sir.

Q So, it was in between the time—

A That is correct.

Q —that she finished out the year for which she was employed and the beginning of the year for which she was not employed that she came to see Mr. Morris about?

A That is correct.

Q About reemployment?

A Now, it could have been before school was out, but I believe it was in the summertime, to the best of my knowledge, the best of my memory.

THE COURT: [225] All right. I wanted to get that in my mind, when she went in to ask for reemployment.

Q The letters to the Atlanta people was in April of '72, and the proof shows that she had already been notified that she was not going to be reemployed before that ever happened.

A Right.

THE COURT: I wanted to find that out. All right, thank you.

(The witness stepped down.)

All right, the defendant has rested now. Do you have anything in rebuttal?

MR. BANKS: No, Your Honor.

THE COURT: I want to ask Mrs. Hodges a question about this matter. I want to put Mrs. Hodges back on the stand and ask her about this matter of when she talked to Mr. Morris to be reemployed.

AND THEREUPON,

DOLLYE W. HODGES,

called as a witness on behalf of the Court, having been previously sworn, testified as follows:

BY THE COURT:

Q Mrs. Hodges, you have heard the testimony here of [226] the Superintendent of the schools now that he was

present at the time, some time, either at the end of the 1971-72 school year, or in the summer, the six weeks that followed that school year, when you came back to see Mr. Morris about reemployment.

Will you testify as to what happened about that matter?

A Yes, sir, it was in September of '72, at the beginning of the next school year. And I heard that there was an opening at O'Bannon and they were looking for a counselor. So I got into my car and drove down to ask Mr. Morris if he would reconsider hiring me.

Q Yes, ma'am.

A And I asked him if he would consider hiring me, and he said, "No", he would not consider it. And I asked him why. He said, "First, Mrs. Hodges, two years ago when I asked you to teach fourth grade you refused to teach fourth grade. You said you were ill, but I learned later that you said it would be taking a demotion from a high school counselor to a fourth grade teacher, and that the Court had said not to take a demotion", so you refused to teach the fourth grade. And he said, "That is one reason why I would not hire you".

"The other reason is a letter that you wrote." And I said, "Which letter, Mr. Morris"? This is the first [227] time I had heard of a letter. No one had told me anything about a letter before then. And he said, "The letter you sent to Atlanta". And I asked him to let me see the letter, because at that time I was not thinking of the recommendation I had sent to Atlanta. And he called Mr. Adams and asked him to bring my record in. And that is when I heard of the letter.

Q He showed you the letter?

A Yes, sir, he showed me the letter, and I read it. And I told him I had written it then. I told him, as I told the Court earlier today, that I was under pressure, I was looking for a job or trying to get into a doctorial

program, and I was under pressure, and I just did it without thinking, but I was sorry.

THE COURT: I understand. I just wanted to get your version of it.

All right.

MR. BANKS: That has been brought out on direct, Your Honor. That is the reason I didn't call her back.

THE COURT: All right, you may step down. I wanted to refresh my memory with reference to the matter.

All right, gentlemen, do you want to argue the case? [228] If you do, we are not going to argue it this afternoon, I will tell you that. I want to know how much time you want to argue.

MR. ROBERTSHAW: If the Court please, I would like to argue but I would much prefer arguing it in the morning.

THE COURT: Well, I would prefer that too, because it is getting late. It is 4:30, and I would like to study the records a little bit myself before the arguments.

MR. BANKS: I would rather submit a brief rather than oral argument to the Court.

THE COURT: Well, I think I will just hear the oral argument to see if I can't decide it from the bench, because I don't want to take it under advisement and have to write a long and detailed opinion in the case.

I think I will see if I can't get the evidence together and make some decision on it and decide it tomorrow.

So, we will be in recess now until 10 o'clock in the morning. Be back at 10 o'clock in the morning. That will give me time in the morning to look over the records.

[229] (Court adjourned from 4:30 p.m., Wednesday, May 7, 1975, until 10:00 a.m., Thursday, May 8, 1975.)

THE COURT: Be seated, please.

Gentlemen, how long do you want to argue the case this morning? Ladies and gentlemen. I apologize, Miss Stewart.

MISS STEWART: That's okay.

THE COURT: We have so few ladies that practice law in my court, I very often neglect to bring them into the form of my questions, or the form of my introductions.

About how long, Mr. Banks?

MR. BANKS: Fifteen or twenty minutes will be fine.

THE COURT: Will that be satisfactory with you?

MR. ROBERTSHAW: I would prefer about thirty.

THE COURT: Can't you say in twenty minutes what you can say in thirty, sort of get it together?

MR. ROBERTSHAW: I have it fairly well organized, Judge. I think [230] it will take about thirty minutes.

THE COURT: All right. Then you have thirty minutes to the side.

MR. ROBERTSHAW: If I can cover it in less time, I will.

THE COURT: All right.

(Mr. Banks then argued to the Court on behalf of the plaintiffs.)

(Mr. Robertshaw argued to the Court on behalf of the defendants.)

(Mr. Banks made a final argument to the Court.)

THE COURT: Gentlemen, court will be in recess until 11:15.

(Court recessed from 10:50 a.m. until 11:22 a.m.)

—RULING OF THE COURT—

THE COURT: I have decided in this case, in view of the evidence that has been presented to the Court and the complicated nature of some of the legal principles which are involved in the case, that I am going to take the case under advisement.

It is my recollection—and if I happen to be wrong about it, I would appreciate being corrected by counsel [231]—that the first order in the Ayres case, as I recall it, was entered some time in the summer of 1969. I am not sure whether or not that order included the Singleton provisions or not, or as to whether they were not brought forward into the order of the Court until in February of 1970, or at least in January of 1970.

The evidence in this case shows that Mrs. Givhan was not reemployed for the 1971-72 school year.

Is that not correct?

MR. ROBERTSHAW: No, sir, she was employed for 1970-71. Excuse me. I misunderstood the Court.

THE COURT: My notes show that she was not—and I reviewed this before I made these notes—that she was not recommended for reemployment for the school year 1971-1972.

MR. ROBERTSHAW: That is correct. And the orders that the Court referred to, the Singleton decree is contained in the order of January 12th.

THE COURT: 1970?

MR. ROBERTSHAW: 1970. And the order signed on January 21st of [232] 1970, in paragraph 8, incorporates paragraph 4 of the January 12th order.

THE COURT: Well, there is no question but what the Singleton provisions were not in force in this school district when the decision was made not to reemploy Mrs. Givhan in the spring of 1971.

As I understand it, she was moved into this school for the full year of 1970-71. She maybe was in the school the year before. But, anyhow, she did teach there in 1970 and 1971, and she had had previous service with the school district for about eight years, as I recall, and prior to that time had been employed in the Bolivar County schools for four years.

Now, the only question that I have in my mind at this time that prevents me from rendering a decision in this

case is whether or not there was a compliance by the school district with reference to the provisions of the Singleton decree when it made the decision not to re-employ Mrs. Givhan in the 1971-72 school year.

The same thing applies to Mrs. Hodges in the 1972-1973 school year.

So I am going to ask counsel to give me a brief on that one point. Assuming for the sake of the brief, and for the sake of argument, that there has been a [233] failure on the part of the plaintiff in the case to show by a preponderance of the evidence that the reasons or causes for the noncontinuance of these two teachers in this school system was other than the reasons given by Mr. Leach.

In other words, assuming for the sake of argument that they were not employed because of those reasons and not because of any racial discrimination or violation of any First Amendment rights on the part of Mrs. Givhan, leaving those out of consideration. I don't care to have any argument about that, nor the law either, because I think I am fully informed on that.

But there is a case in the Fifth Circuit discussing the discharge of teachers while the school is being desegregated and is under the process of performing the unitary system that certain prerequisites have to be followed before you are permitted to discharge or the failure to rehire a person in the school.

Now, there has been no evidence in this case that this school district established any criteria by which teachers would be demoted or would be discharged because of the fact that they were not needed to teach in the school. There is no evidence in this case that the school has any written criteria established. So, that question is uppermost in my mind now, and I must have [234] some assistance on it from counsel.

I give the plaintiff ten days within which to file a brief on that one particular point—whether or not the discharge of these two teachers was in violation of the Singleton provisions of the order desegregating the school district.

And I will give counsel for the defendants the opportunity to reply within ten days. And I will give plaintiff an opportunity to respond within five days after that. The regular schedule for briefing that is adopted by the court.

Now, as I say, I do not want you to go into a brief on the other points, because I feel like I have that pretty well under control. But I do need a little assistance on the question of whether or not these are Singleton cases and would involve a Singleton discharge. If so it might have some bearing on the case and what I feel like I should do about it.

Is there any question now on the part of either party with reference to what I want?

Do you have any questions, Mr. Robertshaw?

MR. ROBERTSHAW: No, sir.

THE COURT: All right, after I receive those briefs, then I [235] will give you some written decision in connection with the case. I will file a written decision and opinion in connection with the matter.

Court will be in recess until 4 o'clock this afternoon, at Oxford, Mississippi.

(Concluded at 11:42 a.m., Thursday May 8, 1975.)

—CERTIFICATE OF COURT REPORTER—

I, B. L. Holman, Official Court Reporter for the United States District Court for the Northern District of Mississippi, hereby certify that the foregoing *235* pages constitute a true and correct transcript of the proceedings reported by me in the above-styled cause on May 7 and 8, 1975.

This, the 13th day of November 1975.

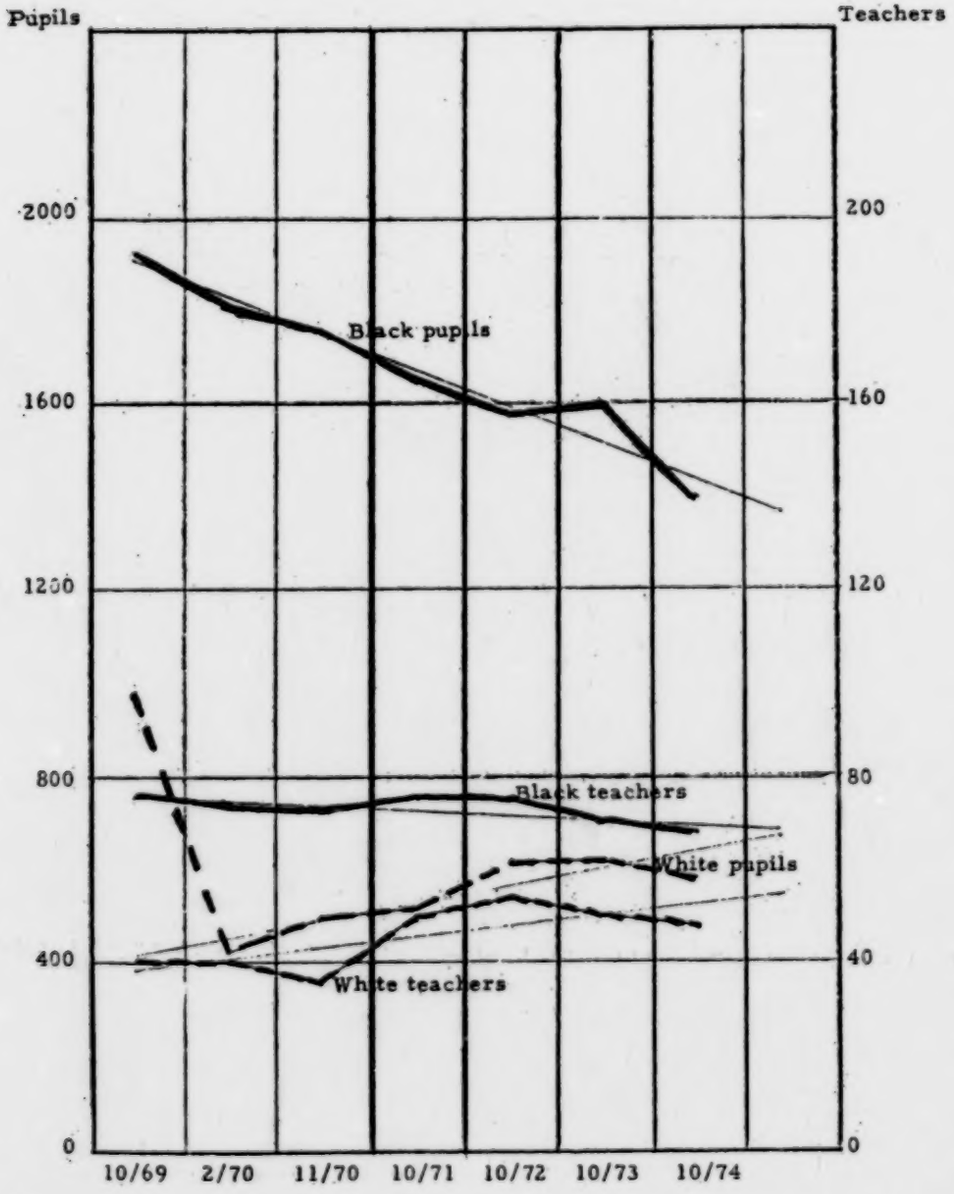
/s/ B. L. Holman
B. L. HOLMAN
Official Court Reporter

B. Trial Exhibits

Stipulated Exhibit No. 1, Analysis of Annual Changes, Classroom Teachers, WLCSD 1969-70 through 1973-74, is printed as Appendix II of the Brief in Opposition.

Stipulated Exhibit No. 2

POPULATION CHANGES, WLCSD
Classroom Teachers and Pupils
1969-70 through 1974-75



SOURCE: Chart II, Plaintiffs-Intervenors' Response to Defendants' Supplemental Request for Admissions

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1051

BESSIE B. GIVHAN,
Petitioner,

v.

WESTERN LINE CONSOLIDATED SCHOOL DISTRICT, *et al.*,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

J. ROBERTSHAW, ESQUIRE
P. O. Box 1498
Greenville, Mississippi 38701

Of Counsel:

ROBERTSHAW & MERIDETH
P. O. Box 1498
Greenville, Mississippi 38701

WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D. C. 20001

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1051

BESSIE B. GIVHAN,
Petitioner,

v.

WESTERN LINE CONSOLIDATED SCHOOL DISTRICT, *et al.*,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SUPPLEMENTAL STATEMENT OF THE CASE

We think the opening statement in petitioner's brief that respondents decided "to terminate" her employment "because she urged her principal to modify practices in her school which she believed to be racially discriminatory" is misleading and tends to create an erroneous impression that could carry forward in the reader's mind [Petitioner's brief, 3].[1]

---

[1] Petitioner's present counsel took no part in the case at a trial level and must perforce rely upon the Court of Appeal's opinion. We do not intend to, and do not suggest that the wording of this opening paragraph is intentional.

First, petitioner's employment was not "terminated";[2] her contract had expired, she had no tenure, had no right to be tendered another contract, and she was simply not re-hired. [Appendix, 8a]. The distinction is an important one.

Secondly, petitioner correctly states the findings of the District Court that the primary reason for not re-hiring petitioner "was her criticism of the policies and practices of the school district, especially the school to which she was assigned to teach", and that "the school district's motivation in failing to renew Givhan's contract was almost entirely a desire to rid themselves of a vocal critic of the district's policies and practices which were *capable* of interpretation as embodying racial discrimination." App. 8a-9a, 35a-36a. [Emphasis added.]

As we understand the decision of the Fifth Circuit, the substance is that the criticisms of petitioner as to the policies and practices of the school to which she was assigned were not protected by the First Amendment. We suggest that Judge Roney sums it up rather neatly in his concurring opinion, without being fancy, by simply saying:

> "* * * I think that there are probably many occasions when First Amendment constitutional protection will reach private expression by a public employee, but I agree that the district court erred in casting this case in First Amendment terms". App., 26a.

As in *Schenck* v. *U.S.*, 249 U.S. 47 (1919) it is important to consider the factual circumstances surrounding the exercise of rights for which First Amendment protection is sought. As Mr. Justice Cardozo once ob-

[2] Under Mississippi law, a teacher may be "terminated" only for incompetence, neglect of duty, immoral conduct, intemperance, brutal treatment of a pupil, or other good cause . . ." Mississippi Code of 1972, § 37-9-59.

served before becoming a member of this Court, what is "reasonable" is "like a jewel that varies in color and content with its setting."[3]

The setting here is that respondents have an unbroken history of complying with the law in complete good faith. When "separate but equal" was the rule, facilities for black schools were equal to or better than those for white schools; when "freedom of choice" was the vogue, respondents had adopted such a policy even broader than that required in *Singleton* v. *Jackson Municipal Separate School District*, 355 F.2d 865 (5th Cir., 1966), two years before standards were set by the courts; prior to the institution of this action, respondents had adopted a desegregation plan approved by HEW, modified only slightly by Judge Claude F. Clayton.[4]

Respondent district is a long, skinny, rural school district, extending some 40 miles north and south and varying in width from 10-12 miles to 2 miles (where it surrounds Greenville Municipal Separate School District). It has three attendance centers, Riverside (which includes the former Avon school) in the middle, O'Bannon some 11 miles to the north, and Glen Allan some 14 miles to the south. At the beginning of the 1969-70 school year, O'Bannon was predominantly black, Riverside had predominantly white and predominantly black schools, and Glen Allan had a predominantly white and an all black school. All three offered grades 1-12. In the middle of the 1969-70 session, under the orders entered January 12 and 21, 1970 [App. 2a-3a], all high school students from the entire district were assigned to Riverside, all elementary students divided between O'Bannon and Glen Allan.

[3] We remember this vividly from our law school days, but cannot locate the citation.

[4] Order entered by Judge Clayton on August 10, 1966, the relevant portions of which are reproduced in Appendix I.

This was done between the end of the first semester and the beginning of the second. All high school desks, lab equipment, library books, etc., had to be moved from O'Bannon and Glen Allan to Riverside, and all elementary paraphernalia from Riverside to O'Bannon and Glen Allan. Similarly virtually all teachers had to be reassigned, and virtually all students were snatched from familiar surroundings and thrust into classrooms with other students whom they did not know and in many cases put under teachers whom they did not know, all in the middle of the school year.

The result, understandably, was utter chaos. Under an agreed order entered on June 29, 1970, the district was reconstituted into three attendance centers with geographical zones, and all furniture, fixtures, equipment, library books, etc., were moved back whence they came. In the process, between the 1969-70 school year and the 1970-71 school year the district lost 17.8% of its black teachers, 52.8% of its white teachers, 5.8% of its black pupils and 56.7% of its white pupils.[5]

Petitioner's conduct must be considered in the light of conditions existing at Glen Allan school when it reopened for the 1970-71 session following these disruptive changes. As the District Judge put it,

> "The court is aware of the considerable problems which occurred in this school district during the establishment of a unitary system in the 1969-70-71 period. There were several incidents of student and teacher demonstrations and other unpleasant manifestations of general discontent and unrest among the black community as to the course of the desegregation of the Western Line Consolidated School District. Most happily, the passage of time has dissipated the great majority of this friction." App., 35a.[6]

[5] Tables I and II, Stipulated Exhibit 1, CA 5th Appendix, 328, Appendix II.

Being more specific, when the 1970-71 session re-opened, when Leach became principal on October 8, 1970, the Glen Allan center had been without a principal for the first several weeks. His immediate problems

> "* * * included racial hostility, lack of discipline among the students, and lack of cooperation among the teachers. Shortly after his arrival as principal, Leach solicited greater cooperation at a teacher's meeting. Givhan [petitioner] implied at the meeting that she did not intend to cooperate very much, and Leach later held a private conference with her. Leach testified that at the conference Givhan told him that 'she didn't like Western Line District. She didn't like Morris, who was the Superintendent, or anything connected with the system.' Givhan denied making these statements." App., 5a.[7]

It is, or should be obvious that in the tense situation encountered by the principal, full cooperation of all was essential to maintain a strict discipline and to get on with the educational process in an orderly manner. Under such circumstances, petitioner's announced intention not to cooperate with the principal made at the faculty meeting, her controversy with the principal in a hallway (in the presence of students) over the giving of a six-weeks test, her arguments over work assignments for black NYC student workers,[8] and her objections to the

[6] Significantly, the improvement occurred *after* petitioner was not re-hired.

[7] As a specific example of petitioner's lack of cooperation, note the incident where she had protected a student during a weapons shakedown by concealing his knife. App. 6a, footnote 7.

[8] There were no white NYC student workers, so the assignment could not be said to be racially discriminatory.

assignment of a white to take up cafeteria tickets,[9] considered together, is fairly akin to "falsely shouting fire in a theater." *Schenck* v. *U.S.*, 249 U.S. 47, 52 (1919).

PRELIMINARY STATEMENT

As Judge Gewin stated below, "It is often said that hard cases make bad law." App. 19a. As Judge Roney, concurring, stated, ". . . I agree that the district court erred in casting this case in First Amendment terms." App. 26a.

The sad truth of the business is that this case, from start to finish, was tried as a *Singleton III*[10] case.

In the district court ruling from the bench [Appendix III], the judge called for briefs on the sole question of whether respondents' failure to rehire petitioner and her co-intervenor, Hodges, was a violation of the *Singleton III*-type order entered on January 12, 1970, specifically stating no argument was desired on whether there was any racial discrimination or on whether failure to re-hire petitioner was a violation of First Amendment rights. However, in rendering his decision, the district judge completely avoided the *Singleton III* issue and went off on the First Amendment grounds as to petitioner, which had not been seriously argued by either side and had not been briefed by either. Perhaps "vigorous and robust discussion" of the issues by opposing counsel might have shed some light.

---

[9] The white was assigned by the District cafeteria supervisor at the request of the Glen Allan cafeteria manager (a black).

[10] *Singleton* v. *Jackson Municipal Separate School District*, 419 F.2d 1211 (5th Cir., 1969) (en banc), *rev'd and remanded sub nom. Carter* v. *West Feliciana Parish School Board*, 396 U.S. 290 (1970), *on remand*, 425 F.2d 1211 (5th Cir., 1970).

ARGUMENT OPPOSING CERTIORARI

I. First, We Should Determine What the Court of Appeals Did and Did Not Hold.

As we understand the decision under review, the court of appeals first determined it was not bound by the district court's legal conclusion petitioner's conduct was protected by the First Amendment, and then proceed with its own analysis of that conduct.

On petition for certiorari, the question before this Court is whether the decision conflicts with the decision of another court of appeals on the same matter, or whether it decided an important question which has not been, but should be settled by this Court, or in a way which conflicts with other applicable decisions of this Court. Rule 19, 1(b). This necessarily requires some consideration of petitioner's conduct vis-a-vis the First Amendment.

There can be no question from the record in this case but that petitioner was a highly vocal, militant teacher; it is equally clear, however, that in those instances where petitioner did act or speak out on issues of public concern, her First Amendment rights were meticulously respected. Specifically, (1) the instance where petitioner and others disrupted a PTA meeting at which plans for an ungraded elementary school system were being discussed, it was in protest over transfer (at the beginning of the 1969-70 session) of two black teachers from the predominantly black O'Bannon center to the predominantly white Riverside center;[11] and (2) the instance where it became necessary to advise petitioner and other teachers that their reporting to assigned positions (when the district was converted to a one-high school, two-

---

[11] The transfer was to comply with an order entered August 22, 1969, requiring not less than six black teachers assigned to Riverside.

elementary school configuration, required under the order of January 21, 1970) was a condition of continued employment. The teachers had met, drawn up "protests", and a serious question had arisen as to whether they would report for work. Record, 189-192.[12]

Although it was the view of respondents that these instances were intended to and had the effect of heightening racial tension and making it more difficult to comply with specific directives of the district court, petitioner's First Amendment rights and those of the other teachers were respected. No disciplinary action was taken.

Going directly to the conduct treated by the district court and the court of appeals, although both disregarded the incident where petitioner protected a student during a weapons shakedown at Riverside in March, 1970 (where all the district high school students had been thrown together in the middle of the school year), by concealing a student's knife until completion of the search [App. 6a, footnote 7], because it did not occur while petitioner was at Glen Allan, we think that evidence relevant on two points: (a) it illustrates the lengths to which petitioner actually went in refusing to cooperate with the administration and in sabotaging efforts to maintain some semblance of an orderly educational process, and (2) it directly supports evidence that petitioner's announced intention was not to cooperate with the school administration [App. 4a, footnote 6; 5a].

This strips the case down to the incidents during the 1970-71 school session for which petitioner claims First Amendment protection. They are: (1) that black people be placed in the cafeteria to take up tickets, a job petitioner considered "choice";[13] (2) that the administrative staff be better integrated;[14] and (3) that black NYC workers be assigned semi-clerical office tasks instead of only janitorial-type work.[15]

[12] To avoid confusion, the Appendix filed with the Court of Appeals will be cited as "Record".

All three of these topics relate solely to the internal operation of the Glen Allan center. In point of fact, the principal had no alternative in any of the three areas under discussion. Assignment of the ticket-taker in the cafeteria was not under Leach's jurisdiction.[16] It does not appear anywhere in the evidence that the respondents could use more than one clerical employee on the Glen Allan administrative staff, and with three of four supervisory positions filled by blacks, about the only way the staff could be "better integrated" would be for the white

[13] The principal's undisputed testimony is that the district cafeterias were run by the district supervisor who assigned the white ticket-taker at the request of the Glen Allan cafeteria manager (a black) and that the management of the cafeteria was not under his jurisdiction. App., 7a. Although not in the record, the truth of the matter is that the black ticket-takers were replaced because *no* tickets were collected by them, and *everyone* was eating free. "Choice"?

[14] The court of appeals appears to be mislead as to what "all of the Glen Allan administrative and office personnel" consisted of. It did consist of Mr. Leach, white principal; one secretary, white; Ms. Hodges, black counselor; Mr. Givhan, black assistant principal; and Mr. Jackson, black elementary supervisor [Defendant's Answers to Interrogatories (First Set), served January 17, 1974]. 3 of 5 were black.

[15] As pointed out by the court of appeals [App. 7a], petitioner's protest was based upon her experience at Riverside the preceding year, where white NYC workers allegedly worked in the office and the blacks washed the windows; however, at Glen Allan (a much smaller school), there were no white NYC workers, the black NYC workers were not qualified for clerical duties and in fact were hired to do janitorial work.

[16] As principal, Leach certainly knew what was and what was not within the scope of his authority. Petitioner admittedly did not know. App., 7a, footnote 8. There is no evidence in the record that Leach *did* have such authority.

principal to resign; and, it appearing that there were no white NYC workers and that none of the black NYC workers were qualified for clerical work, the principal had no choice but to employ them in the jobs for which they were hired.

As a matter of plain common sense, it is difficult to see either the utility or the public interest in protecting rights to discuss issues, where no options exist.

We think the principal's views are fairly well summed up in these two quotations from the evidence:

> Q. And you agreed that she was a competent teacher? A. I said all along that Mrs. Givhan was a competent teacher, *if that is what she would have done instead of trying to run the school.*" (Emphasis added.) Record, 124.
>
> "Q. All right, sir. Now, based upon your associations with Mrs. Givhan, did you form any opinion as to whether the school could be successfully or unsuccessfully run with her present? A. When I was deciding on teachers for the following year and had to inform the Superintendent, who in turn would inform the Board, I decided that due to her antagonism and the problems I had had with her all year long, it would be impossible for me to carry on a successful school at Glen Allan the following year with her there. I had decided that if she were there I couldn't be there and carry out the duties, and I was placed there and I intended to do my job, and I felt like I could not do it with Mrs. Givhan there." Record, p. 135.

The other two topics considered by the court of appeals we would consider to be purely relating to the employment of petitioner, not matters of public interest, and not matters subject to First Amendment protection. They are: (1) the matter of the memorandum to all teachers reminding them of six-weeks' tests which petitioner

> "* * * apparently thought the memorandum was insufficient advance warning; [and] while students were changing classes she discussed (or perhaps argued) with Leach about the inadequate notice and whether she was to give a 'pop test.' Leach interpreted this challenge to him in front of students as reflecting her antagonism. Givhan in effect admitted the incident, but explained that her concern for timely notice was generated by the memorandum's subject relating to the more comprehensive semester, not six weeks', tests." App., 5a."[17]

and, (2) petitioner's refusal to administer a standardized achievement test."[18]

With this background, the court of appeals majority opinion holds that petitioner's conduct is not of the type protected by the First Amendment. Judge Roney in his concurring opinion states that there are probably many occasions where First Amendment protection reaches private expression, but agrees with the majority that petitioner's conduct does not fall within these "many occasions".

II. The Holding in This Case Does Not Conflict With the Decisions of Other Courts of Appeals on the Same Matter, Nor Does It Conflict With Other Applicable Decisions of This Court.

At the outset, we note that all of the court of appeals decisions which petitioner suggests are or may be in

---

[17] It is faintly ridiculous for a teacher to complain of insufficient advance warning of *either* a six weeks' test or a semester test. Both are scheduled before school commences as a matter of routine and the nomenclature, in and of itself, constitutes "advance warning" of the time the test is due. *Neither* could be remotely considered a "pop test."

[18] There may be a conflict as to who ultimately administered the test, but there is no conflict in evidence of petitioner's refusal. Assuming she did, in fact, give the test, it was done only after another teacher had been assigned the task by the principal.

conflict with the decision under review were decided prior to *Mt. Healthy City Board of Education* v. *Doyle*, 429 U.S. 274 (1977), and must be read in the light of that decision. As we understand *Doyle*, it holds that even if First Amendment protected conduct playing "a substantial part" in the board's decision not to renew the teacher's contract, *nevertheless* the teacher may not be placed in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing. As re-stated by the Court, the teacher ought not to be able, by engaging in such conduct, to prevent his employer from assessing his performance record and reaching a decision not to re-hire on the basis of that record, simply because the protected conduct makes the employer more certain of the correctness of its decision. Prior to *Doyle*, where protected conduct was a substantial factor in the decision not to re-hire, the teacher automatically prevailed. The "second layer" of *Doyle* holds that the burden is properly on the teacher to establish (1) that his conduct was constitutionally protected *and* (2) that it was a "substantial factor" or "a motivating factor" in the District's decision not to re-hire. Once the teacher has passed these two hurdles, the burden passes to the district to show by a preponderance of the evidence. Consequently the court of appeals decisions cited by petitioner as conflicting with the decision under review must be considered as modified by *Doyle*.[19]

The case at bar does not conflict with *Pickering* v. *Board of Education*, 391 U.S. 563 (1968), involving a teacher's letter to the editor of the local paper critical of the manner in which past proposals to raise school revenues had been handled by the board and superintendent. We would regard this public comment on a public

[19] The case at bar was decided by the district court in 1975, prior to the *Doyle* decision. However, since the Fifth Circuit has held petitioner's conduct not protected by the First Amendment, *Doyle* does not come into play.

issue as First Amendment protected conduct, but would distinguish that type comment from internal criticism on issues where the principal had no alternate course and from petitioner's argument over a memorandum relating to administration of a six-weeks' (or perhaps a semester) test, and her refusal to administer an achievement test clearly within the scope of duties she was hired to perform. *Pickering* simply holds that once First Amendment protected conduct has been established, the interest of the teacher's constitutionally protected rights must be balanced against the interest of the state in getting the job done efficiently through its employee.

Ring v. *Schleshinger*, 502 F.2d 479 (D.C., 1974), went off on summary judgment, and was simply remanded for trial on the issue of whether the teacher was discharged in retaliation for First Amendment protected comment. The case does not stand for the proposition that the teacher's memorandum on her principal's incompetency and lack of ethics was protected conduct. In its decision, the court of appeals stated:

> "Mrs. Ring has yet to show that she was, in fact, so dismissed [for constitutionally protected conduct]. The District Court foreclosed any opportunity to make this showing when it granted summary judgment to the Government. We think that there is a genuine dispute as to whether appellant was dismissed on an impermissible basis—as a reprisal for the exercise of constitutionally protected right." 502 F.2d at 490.

In the case at bar, after a full trial, the court of appeals is unanimous in holding that petitioner's conduct was not protected.

Roseman v. *Indiana Univ. of Pennsylvania, at Indiana*, 520 F.2d 1364 (3d Cir., 1975), *cert. den.*, 424 U.S. 921 (1976), directly supports the decision before this Court, and does not conflict. In affirming, the court of appeals

first held that since the communications, made in a forum not open to the general public and concerning an issue of less public concern than *Pickering's*, "the First Amendment interest in their protection is correspondingly reduced." 520 F.2d at 1368. *Next*, the court observed that the communications would undoubtedly have the effect of interfering with harmonious relations with the teacher's superiors and co-workers. *Pickering* was distinguished on the dual grounds that Pickering's statements were not directed towards any person with whom he would normally be in daily contact in the course of his daily work as a teacher, and that that case did not involve a question of maintaining either discipline by immediate superiors or harmony among co-workers. Its final ruling was

> "For reason of these distinctions between the plaintiff's communications and the communications at issue in *Pickering*, we have concluded that plaintiff's communications fall outside the First Amendment's protection. Because they do, the University did not deny the plaintiff her First Amendment rights, even if it considered her statements in making its non-renewal decision." 520 F.2d at 1369.

In the case at bar, the undisputed testimony of the principal (quoted page 10, *supra*) is simply that petitioner was a competent teacher, *if* she would only attend to teaching and not try to run the school, but that when time came to recommend teachers for the coming year, he reached the conclusion that because of petitioner's antagonism and the problems he had had with her all year, he would be unable to run the school successfully the following year with petitioner continued in employment as a teacher. We think the overall flavor of this case supports that conclusion.[20]

---

[20] Principals are not always as articulate on the witness stand as trial counsel might desire. We think, however, that a principal is better able to reach a reasoned administrative decision (necessarily a highly subjective one) on the basis of daily contact with a teacher, daily observation of demeanor and attitude, than is a trial judge bound by rules of evidence and forced to rely on secondhand reports. For example, the same words, delivered in a loud, arrogant tone in the context of the racially tense situation that existed at Glen Alian during 1970-71 may, and usually do, sound perfectly innocous when repeated in a court room.

Superficially, *Janetta* v. *Cole*, 493 F.2d 1334 (4th Cir., 1974), would appear to be in conflict with the case at bar, but the decision there is based upon specific findings of the district court that the expression of plaintiff was protected by the First Amendment, with which the court of appeals agreed, that the conduct did not adversely affect the efficiency of the fire department, and that the conduct was the *sole* reason for suspension. In this case, we have the conclusion of the court of appeals that First Amendment protection does *not* reach petitioner's conduct, which conclusion we submit is supported by the evidence discussed under Point I. We think the difference between the two cases is entirely factual and falls within the following language of this Court in *Pickering*:

> "• • • Because of the enormous variety of fact situations in which critical statements by teachers and other public employees may be thought by their superiors, against whom the statements are directed, to furnish grounds for dismissal, we do not deem it either appropriate or feasible to lay down a general standard against which all such statements may be judged." 391 U.S. at 569.

Janetta and *Roseman*, *supra*, reach different results in the application of *Pickering*, and of the two, we believe *Roseman* is the better reasoned and is more applicable to the factual situation in this case. We point out that even if petitioner's conduct may be considered protected, there remains the "second layer" of *Doyle* which would require remand to determine whether the decision not to re-hire would have been made anyhow.

Smith v. *Losee*, 485 F.2d 334 (10th Cir., 1973), is based upon a specific finding of fact that the actions of the defendants in denying plaintiff permanent status and employment were taken to punish him for having supported a particular candidate in a state political election, for having opposed the administration in his capacity as president and member of the executive committee of the faculty association, and for having expressed opposition to "some administration policies" at faculty meetings. It was specifically found that no other justifiable grounds existed for denying tenure or employment, and that the action was taken with actual malice (sufficient to support punitive damages). We would certainly agree that the right to support the political candidate of one's choice is a First Amendment protected right. We would also agree that the right to oppose policies taken by one in his capacity as a member of the executive committee and of the faculty association would be protected, particularly where it is presumably a function of the committee and association to participate in the formulation of policy. We point out that the discussions concerned policies where alternates were available; that is, the discussions were to assist in a decision as to which of several policies should be adopted, or to suggest reconsideration of an existing policy. However, in the case at bar, there is no such clear cut First Amendment right as the right to support the candidate of one's choice, and the principal here *had no choice* but to implement district policy in the employment of NYC workers, in the assignment of the ticket-taker, or in the employment of additional help on the administrative staff. We do not believe the case is in conflict with the decision at bar.

Hostrop v. *Board of Junior College Dist. No. 515, etc., Ill.*, 471 F.2d 488 (7th Cir., 1972), involved a dismissal for failure to state a claim upon which relief could be granted, and contains three separate grounds for reversal: possible First Amendment protection, deprivation

of "liberty" in the sense that plaintiff's standing in the community was damaged by a charge of an unsavory character trait without procedural due process, and deprivation of contract property interests without procedural due process. The court of appeals, in dealing with the First Amendment basis for reversal, simply held that the allegations of the complaint that plaintiff, a college president, had circulated the offending memorandum as a part of his official duties and that it was only several days after it had become public that members of the Board told him he had no right to express his views in such a way and that he would be terminated because of this expression. The holding of the court was that these facts, as alleged, clearly showed arbitrary action on the part of the defendants which the *due process* clause was meant to protect, but pointed out that the defendants, on trial, might demonstrate that plaintiff's circulation of the memorandum was evidence of insubordination [21] and actually produced the harmful effects which, under *Pickering*, could justify the discharge. The court's dicta on the First Amendment aspect are thus ambivalent. Its *holding* is a due process holding, not a First Amendment holding, and the decision cannot be said to conflict with the decision under review.

III. The Decision of the Court of Appeals Under Review Does Not Involve an Important Question of Constitutional Law Which Has Not Been, But Should Be, Settled by This Court, Nor Does It Conflict With Applicable Decisions of This Court.

First, the decision under review is carefully limited to the facts then before the court by this language:

> "But before doing so [i.e., striking the *Pickering* balance] we must determine whether on the facts of

[21] Cf.: petitioner's refusal to administer the standardized achievement test and her challenge to the principal of the memorandum on six weeks' (or perhaps semester) test in the presence of pupils.

this case the teacher had a First Amendment interest *as a citizen* in making complaints to the principal." App. 13a. Emphasis is in the original.

Moreover, reading the decision under review in the light of the facts of the case, to which the ruling is limited both by the opinion, itself, and by general rules of case-law construction, it is apparent that it has the support of *Pickering*, whether or not petitioner's conduct has First Amendment protection.

The principal, in transmitting his decision not to rehire petitioner to the district superintendent, stated:

> "Ms. Givhan is a competent teacher, however, on many occasions she has taken an insulting and hostile attitude towards me and other administrators. She hampers my job greatly by making petty and unreasonable demands. *She is overly critical for a reasonable working relationship to exist between us.* She also refused to give achievements tests to her homeroom students." [May 1, 1971.] App., 42, emphasis added.

In complying with petitioner's request for a statement of the reasons she was not re-hired, the superintendent wrote [July 23, 1971]: [22]

> "(1) a flat refusal to administer standardized National tests to the pupils in your charge; (2) an announced intention not to cooperate with the administration of the Glen Allan Attendance Center; (3) and an antagonistic and hostile attitude to the administration of the Glen Allan Attendance Center demonstrated throughout the school year." App., 4a.

Looking at the general guidelines of *Pickering*, [391 U.S. at 569-570], it is immediately apparent that the

---

[22] The intervention complaint was filed September 14, 1973 [Record, p. 8], more than two years following the dates given. These reasons were no after thoughts.

petitioner's conduct was directed towards the principal with whom she would normally be in daily contact in the course of her work as a teacher; that there was a serious question of maintaining discipline and harmony among coworkers; and that it can be persuasively claimed that personal loyalty of teachers to the school is necessary for proper functioning.

Indeed, we advance as axiomatic that the following criterion is an absolutely essential trait for a teacher:

> "6. *"Teacher-Administrator (Loyalty).* The degree of acceptance and execution of school policy and graceful fulfillment of an assignment is an indication of the loyalty exerted by a teacher to the school district. This should be the number one professional characteristic and is the leading factor in determining the success of an educational system."

Pickens v. *Okolona Municipal Sep. Sch. District*, 380 F. Supp. 1036, 1039-40 (N.D., Miss. 1974), affirmed, 527 F.2d 358, 360 (5th Cir., 1976) (Approving the above as a *Singleton III* objective criterior where a rating of 1 on a 1-5 scale meant that the teacher so evaluated would not be considered for reemployment.)

Therefore, it follows from the above and from our more detailed discussion of petitioner's conduct earlier in this brief that she was neither a "whistle blower" nor did her conduct remotely resemble "quiet dialogue through channels" as is suggested in the Petition at pages 7-8.

CONCLUSION

It is not enough to eliminate segregation "root and branch"; something must grow in its place. It is or should be apparent from the facts in this case that petitioner's conduct, at a critical time in the transition to a

unitary system, was calculated to and had the effect of making it more difficult for her principal to restore order and discipline at Glen Allan, and making it more difficult to establish and maintain an atmosphere within which a quality educational system could operate. Significantly, the district court noted the "several incidents of student and teacher demonstrations and other unpleasant manifestations of general discontent and unrest among the black community as to the course of desegregation" [App., 35a] of the respondent district, and that "[m]ost happily, the passage of time has dissipated the great majority of this friction" [App., 35a]. It is also significant, that the dissipation did not occur until after the departure of petitioner from the system.

We note that in *Roseman, supra*, certiorari was denied by this Court, which may or may not indicate tacit approval of its holding that the interest in First Amendment protection is "correspondingly reduced" [520 F.2d at 1368] where communications [conduct] are in forums not open to the general public. We think that the conduct under review here smacks more of interference in matters *well beyond* the scope of petitioner's employment as a teacher of junior high English, and resistance to orders and instructions *within* the scope of her employment than it does of any right protected by the First Amendment. We again point out that when petitioner *did* exercise First Amendment protected rights by demonstrating against the transfer of black teachers during the fall of 1969, and by meeting with other teachers dissatisfied with the manner in which the district administration was complying with the mid-year directive to reconstitute the school configuration of the district, she did so with absolute impunity.

We respectfully submit that the petition should be denied.

Respectfully submitted,

/s/ J. Robertshaw
J. ROBERTSHAW
P. O. Box 1498
Greenville, Mississippi 38701
Tel. No. 601-378-2171

Attorneys for Respondents

Of Counsel:

ROBERTSHAW & MERIDETH
P. O. Box 1498
Greenville, Mississippi 38701

CERTIFICATE

I, J. ROBERTSHAW, counsel for respondent, do hereby certify that I have this date mailed the foregoing brief to Wilson-Epes Printing Co., Inc., 707 Sixth Street, N.W., Washington, D.C. 20001, in type-written form, via United States airmail, postage prepaid, with instructions to have the same printed, filed with the Court, served upon counsel for petitioner at the address shown below, and its affidavit of such service filed with this Court:

STEPHEN J. POLLAK, ESQUIRE
SHEA & GARDNER
734 Fifteenth Street, N.W.
Washington, D.C. 20005

This 7th day of March, 1978.

/s/ J. Robertshaw
J. ROBERTSHAW

Appendices

APPENDIX I

EXCERPTS FROM MEMORANDUM OPINION RENDERED AUGUST 10, 1966

Five schools, located in Washington County, are operated by WLCSD: Avon Elementary School and Riverside Attendance Center in Avon, Mississippi; Moore Elementary School and Glen Allen Attendance Center in Glen Allen, Mississippi; and O'Bannon Attendance Center in Greenville, Mississippi. Avon Elementary, Moore Elementary and O'Bannon were all Negro schools and Riverside and Glen Allen were all white schools, prior to the 1965-1966 school year. On 5 August, 1965, the Board of Trustees of WLCSD adopted a desegregation plan based on freedom of choice which provided for desegregation of grades one and two in the 1965-1966 school year; grades three, four, five and six in the 1966-1967 school year, and all remaining grades in the 1967-1968 school year. The plan was approved by the Commissioner of Education of the Department of Health, Education and Welfare on 31 August, 1965. An earlier step to desegregation had been taken by WLCSD on 5 November, 1964, through the adoption of a resolution on transfer policy, under which pupils would be initially assigned as in the past but all resquests for transfers would be "handled strictly on the merits, without regard to race," giving consideration only to the "availability of class space, economic transportation, and similar factors." The resolution further provided that "in case of doubt, the request will be approved."

At the beginning of the 1965-1966 school year fourteen Negro pupils enrolled in the first and second grades of previously all white Glen Allen Attendance Center. Three of the fourteen later withdrew from school, leaving eleven Negro pupils enrolled in previously all white schools at the time of the hearing. Three of these children resided

within the town of Glen Allen; all others resided in Issaquena County. No Negro pupils attending previously all white schools who were eligible for bus transportation under state law resided in Washington County.

Record, 14-15

The desegregation plan adopted by WLCSD in August 1965 did not include, in terms, the transfer policy established by the board of trustees in November 1964. However, after the hearing on the motion for a preliminary injunction, WLCSD took several steps to give adequate notice of the transfer policy and it was also included verbatim in a revised version of the plan. Throughout this controversy WLCSD has relied on this transfer policy to meet plaintiffs' objections that the plan did not provide for desegregation of grade twelve as well as the lower grades, as required by *Singleton* v. *Jackson Municipal Separate School District*, 348 F.2d 729 (5th Cir. 1965) (hereafter *Singleton I*) and related cases; that no absolute right to transfer to schools from which the applicant had been excluded because of race or color was given, *Singleton* v. *Jackson Municipal Separate School District*, 355 F.2d 865 (5th Cir. 1966) (hereafter *Singleton II*); and that pupils new to the system were not given a freedom of choice regardless of grade, *Singleton I*, supra.

With respect to the right to transfer regardless of grade so as to escape the effect of unconstitutional racially based assignments, the position of WLCSD is well taken. *Singleton II*, supra, delineates an absolute right, in individuals who have been racially assigned, to transfer to schools from which they were excluded because of race. The WLCSD transfer policy, drafted prior to *Singleton II*, in effect creates a right in all students to transfer on request, without regard to race, subject only to reasonable non-racial administrative standards. If anything,

the WLCSD policy is broader than that required by *Singleton II*, supra. This court's approval of this aspect of the plan is buttressed by the praiseworthy demonstration of good faith on the part of the WLCSD defendants. On the record now before the court, there is no evidence that any Negro pupil has attempted to make use of the right to transfer. Unless and until plaintiffs can show that a pupil has applied for transfer from a school to which he was assigned because of race or color to a school from which he was excluded or would have been excluded because of race or color; that the application to transfer was denied; and that the race or color of the pupil has some bearing on the denial, there would be no basis for finding that the present transfer policy does not meet the requirements of *Singleton II*.

But the transfer policy does not remedy the failure to desegregate grade twelve. While the free right to transfer may make it *possible* for every Negro pupil now enrolled to have the benefits of a desegregated education, more is required. *Singleton II*, supra, states the absolute right to transfer so as to escape from racial assignments and *in addition* reiterates the requirement of *Singleton I*, supra; *Price* v. *Denison Independent School District*, 348 F.2d 1010 (5th Cir. 1965), and related cases, that desegregation start at both ends of the grade structure. Under a freedom of choice plan, a partially desegregated school system may still assign pupils on a racial basis in the grades not yet desegregated. Without the free right to transfer, pupils so assigned must stay in the schools to which they were assigned. The inclusion of the free right to transfer required by *Singleton II*, supra, does not prevent initial racially based assignments in segregated grades, but on the request of any pupil so assigned the school authorities must permit a transfer to cure the initial denial of his constitutional rights. In other words, pupils in desegregated grades must be given and must

exercise a free choice of schools; they can be assigned in no other manner. Pupils in still segregated grades need not be granted a free choice of schools unless they ask for it. Here, regardless of the freedom of choice available to all pupils on request, those eligible for enrollment in grade twelve must be included in the class of pupils who must be granted and must exercise that free choice of schools. Grade twelve must be formally desegregated in the coming school year.

In practice, it seems that pupils new to the system assign themselves to school by presenting themselves for enrollment at the school of their chioce. In form, the plan provides otherwise. Article II (c) requires such pupils to register in the school of their choice in the desegregated grades "and at the school which they would have previously attended" in the segregated grades. Just as in the case of pupils in grade twelve, pupils new to the system must be required to exercise a free choice fo schools and may not be even initially assigned on the basis of race or color.

Total desegregation will be achieved by the 1967-1968 school year as required by *Singleton II*, supra, and four new grades are being desegregated in the coming school year, but the total number of grades desegregated in the penultimate year of the plan is only six. In this court's view of the cases, that number should be at least eight at this point unless special circumstances are shown to justify a lesser number. No such circumstances appear in this case and WLCSD must desegregate at least two additional grades in September 1966. One of these two must be grade twelve. Selection of the other grade will be left to the discretion of the board of trustees.

While defendants admit that heretofore there have been racial inequities in salaries of teachers, good faith efforts to achieve equalization were begun before the filing of this action. Beginning with the 1966-1967 school year, all

teachers are being paid in accordance with a racially non-discriminatory salary scale, and there is no need for injunctive relief in this area.

In response to requests made pursuant to Rule 36, F.R.Civ.P., plaintiffs admitted that physical facilities (buildings, classrooms, equipment, library facilities, cafeterias, etc.) of formerly Negro schools in WLCSD were substantially equal to or superior to like facilities of formerly white schools. They also admitted that pupil-teacher ratios in some white schools on occasion exceeded similar ratios at Negro schools, and vice versa. There is no evidence revealing any inequities in pupil-teacher ratios between comparable schools. They also admitted that all five schools are similarly accredited. The evidence with respect to services and activities, curricular and extracurricular, establishes that existing differences favor the formerly all Negro schools. As to curricular inequalities, any pupil, regardless of grade or race, must be allowed to transfer to obtain courses not available in the school to which the pupil was assigned. *Rogers* v. *Paul*, —— U.S. ——, 15 L.Ed.2d 265 (1965). The transfer policy discussed above adequately meets this requirement. There is no discrimination against plaintiffs and their class in per pupil expenditures of funds. There is no basis for injunctive relief as to any of these areas.

On 26 January, 1966, *Singleton II* required an "adequate start toward elimination of race as a basis for employment and allocation of teachers, administrators, and other personnel." WLCSD made such a start six months earlier with the adoption of Article VI of the plan, which provides:

> Assignment of personnel at all levels and to all positions shall be made without regard to race, color or national origin. The following steps will be taken immediately pursuant to this policy: Beginning the school year 1965-66 the separate In-Service Training Program for teachers—wherein workshops to study

problems relating to the schools are held—shall be eliminated and said program shall include all teachers of Western Line Consolidated School District, regardless of race, color or national origin. All system-wide faculty meetings will be desegregated.

Principals, teachers and other professional staff members will not be discharged or dismissed or demoted solely on the basis of race, color or national origin.

As to future years, all positions shall be filled on the basis of the best qualified person available for a particular post without regard to race, color, or national origin.

The faculties and staffs of the WLCSD schools are either all white or all Negro in accordance with the race of the majority of the pupils of each school. There is no evidence to show that this racial division is the result of any affirmative action taken by the WLCSD defendants since the adoption of the plan in August 1965, and it would appear that it is a residual product of the former policy of segregation, preserved by a combination of inertia and the local preferences of the employees. Plaintiffs have not shown that any employee has applied for a transfer to another school or that an applicant has sought employment in a position for which he or she was qualified, and that a transfer was refused or employment denied on the basis of race or color. On the other hand, services and programs for teachers and administrators have been conducted on a desegregated basis.

On the present record, and with a view toward the temporary nature of this disposition and the opportunity which the parties will soon have to seek revision of the decree to be entered, no other relief to plaintiffs should or will be granted at this time.

A decree will be entered in accordance with the foregoing.

Record, 18-25.

APPENDIX II

STIPULATED EXHIBIT 1

TABLE I

Analysis of Annual Changes Classroom Teachers,
WLCSD 1969-70 through 1973-74

	No. of Teachers		No. Leaving		% Turnover	
Session	Black	White	Black	White	Black	White
1969-70	73	40	9	16	12.3%	40.0%
1970-71	73	36	13	19	17.8	52.8
1971-72	75	50	14	13	18.7	26.0
1972-73	75	54	9	16	12.0	29.6
1973-74	70	50	9	15	12.9	30.0
1969-74	366	230	54	79	14.8%	34.3%

TABLE II

Population Changes
Classroom Teachers and Pupils, WLCSD
1969-70 through 1974-75

		Pupils		Teachers		
Session	% Black	Black	White	Black	White	% Black
Oct. '69	66.2%	1915	976	76	40	65.0%
Feb. '69	81.0	1803	423	73	40	64.6
Nov. '70	77.8	1757	500	73	36	67.0
Oct. '71	76.3	1677	516	75	50	60.0
Oct. '72	72.1	1579	610	75	54	58.1
Oct. '73	72.0	1597	620	70	50	58.3
Oct. '74	70.5	1388	581	68	48	58.6

TABLE III

Losses and "Hires", WLCSD Classroom Teachers
1969-70 through 1973-74

	Black			White		
After Session	Not Rehired	Other Losses	"Hires"	Not Rehired	Other Losses	"Hires"
1969-70	2	7	9	2	14	12
1970-71	5	8	15	1	18	33
1971-72	3	11	14	3	10	17
1972-73	2	7	4	3	13	12
1973-74	1	8	7	3	12	13

APPENDIX III

BY THE COURT:

• • • •

Now, the only question that I have in my mind at this time that prevents me from rendering a decision in this case is whether or not there was a compliance by the school district with reference to the provisions of the Singleton decree when it made the decision not to re-employ Mrs. Givhan in the 1971-72 school year.

The same thing applies to Mrs. Hodges in the 1972-1973 school year.

So I am going to ask counsel to give me a brief on that one point. Assuming for the sake of the brief, and for the sake of argument, that there has been a failure on the part of the plaintiff in the case to show by a preponderance of the evidence that the reasons or causes for the noncontinuance of these two teachers in this school system was other than the reasons given by Mr. Le[illegible]h.

In other words, assuming for the sake of argument that they were not employed because of those reasons and not because of any racial discrimination or violation of any First Amendment rights on the part of Mrs. Givhan, leaving those out of consideration. I don't care to have any argument about that, nor the law either, because I think I am fully informed on that.

Record, 324-325

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1051

BESSIE B. GIVHAN,
Petitioner,

v.

WESTERN LINE CONSOLIDATED SCHOOL DISTRICT et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

REPLY BRIEF FOR PETITIONER

STEPHEN J. POLLAK
RICHARD M. SHARP
734 Fifteenth Street, N.W.
Washington, D. C. 20005

DAVID RUBIN
1201 Sixteenth Street, N.W.
Washington, D. C. 20036

FRED L. BANKS
318 East Pearl Street
Jackson, Mississippi 39205

Attorneys for Petitioner

Of Counsel:

SHEA & GARDNER
734 Fifteenth Street, N.W.
Washington, D. C. 20005

WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D.C. 20001

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1051

BESSIE B. GIVHAN,
Petitioner,

v.

WESTERN LINE CONSOLIDATED SCHOOL DISTRICT et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

REPLY BRIEF FOR PETITIONER

I

(A) In its brief in opposition, the school district urges that Mrs. Givhan's First Amendment rights "were meticulously respected" and that her employment was terminated because she failed or refused to cooperate with the principal and tried to run the school. Opp. 5, 7, 8, 10. This factual contention, as we show below, was rejected by both lower courts.

To support its avowed reasons for terminating Mrs. Givhan's employment, the school district relies heavily on the testimony of the principal. See, *e.g.*, quotations at Opp. 10, 18. The district court did not credit the principal's testimony, saying

> "The court, as finder of fact, after hearing all the testimony and reviewing the exhibits introduced at the trial, has concluded that the primary reason for the school district's failure to renew Givhan's contract was her criticism of the policies and practices of the school district, especially the school to which she was assigned to teach." Pet. App. 35.

On appeal, the school district urged that this "conclusion is not supported by the evidence." Appellants' Brief in the Fifth Circuit, pp. 34-35. In support of its contention, the school district quoted and paraphrased the same testimony of the principal that it now relies on in opposition. (Compare Appellants' Brief in the Fifth Circuit pp. 34-37 with Opp. pp. 7-11, 18.) The court of appeals ruled:

> "It is hard to conceive of issues that usually involve more credibility and other evaluative choices than what motivated someone and what the person would have done absent that motivation. The district court found that Leach [the principal] and the Board were motivated primarily by Givhan's 'demands in deciding not to rehire her.' That finding is not clearly erroneous." Pet. App. 11.

In as much as respondents' factual contentions have been twice rejected by the courts below, they do not provide an appropriate basis for denying the writ in this case.

(B) After characterizing Mrs. Givhan's conduct and statements in a manner entirely favorable to it (Opp. 5), the school district also urges that Mrs. Givhan's discussion with the principal concerning work assignments for black NYC workers, the need for assigning black persons to take tickets in the cafeteria, and the administration of a six week test "is fairly akin to 'falsely shouting fire in a theater.'" Opp. 5-6. If respondent intends to suggest that Mrs. Givhan's First Amendment interests as a citizen are outweighed by the school district's interests "in promoting the efficiency of the public services it performs through its employees," *Pickering* v. *Board of Education*, 391 U.S. 563, 568 (1968), then the argument is directed to an issue that this case does not present.

The court below held that expressions by a citizen or public employee to a public official are per se unprotected by the First Amendment (Pet. App. 13, 19), and in light of that holding it concluded that there was no occasion for balancing Mrs. Givhan's First Amendment interests as a citizen against the allegedly disruptive effects of her speech. Pet. App. 13 & n. 13. Accordingly, this Court is not presented with a balancing issue, but rather with the threshhold question whether a public employee's expressions to a public official ever implicate a First Amendment interest.

II

In the petition, Mrs. Givhan discussed opinions from four courts of appeals which demonstrate that *Pickering's* balancing test is the standard by which a court must determine whether a public employee's communication to his employer is protected by the First Amendment. The school district denies that there is a conflict among the circuits. Opp. 11. Its own brief, however, reaffirms the existence of the conflict. The school district states that two of the opinions cited by petitioner, "*Jannetta* and *Roseman*, *supra*, reach different results in the application of *Pickering* . . . ." Opp. 15. In contrast to *Jannetta* and *Roseman*, the court below expressly refrained from applying *Pickering* because, in its view, communications by a public employee or even a private citizen to a public official are per se outside the protection of the First Amendment.

III

Since the filing of the petition, the opinion in *Pilkington* v. *Bevilacqua*, 439 F. Supp. 465 (D.R.I. 1977), has come to our attention. There the court sets forth reasons why the First Amendment applies to in-channel communi-

cations by a public employee. *Id.* at 474-77. The court concludes:

> "Certainly . . . [the public employee's] criticisms do not lose the protection of the First Amendment by reason of their being prudently directed to his co-employees and superiors inside the . . . [public agency] instead of to the public at large. Absent special considerations not present here, the truth-seeking values protected by the First Amendment apply to criticism of government inside its halls as well as in the letters to the editor column. Indeed, the *Pickering* Court suggested that there may be situations where an employee has a duty to bring his criticism to the attention of his superiors before making it available to the public at large. *Id.* at 572 n.4, 88 S.Ct. 1731. While the Court need not decide whether or not Mr. Pilkington had such a duty, it seems apparent that he did not, by his prudence, forfeit the protection his criticism would have had had he first trumpeted it to the local newspaper." *Id.* at 474-75.

CONCLUSION

For the reasons stated here and in the petition, the writ should be granted.

Respectfully submitted,

STEPHEN J. POLLAK
RICHARD M. SHARP
734 Fifteenth Street, N.W.
Washington, D. C. 20005

DAVID RUBIN
1201 Sixteenth Street, N.W.
Washington, D. C. 20036

FRED L. BANKS
318 East Pearl Street
Jackson, Mississippi 39205

Attorneys for Petitioner

Of Counsel:

SHEA & GARDNER
734 Fifteenth Street, N.W.
Washington, D. C. 20005

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1051

BESSIE B. GIVHAN,

Petitioner,

v.

WESTERN LINE CONSOLIDATED SCHOOL DISTRICT ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF FOR PETITIONER

DAVID RUBIN
1201 Sixteenth Street, N.W.
Washington, D.C. 20036

STEPHEN J. POLLAK
RICHARD M. SHARP
734 Fifteenth Street, N.W.
Washington, D.C. 20005

FRED L. BANKS
318 East Pearl Street
Jackson, Mississippi 39205

Attorneys for Petitioner

Of Counsel:

SHEA & GARDNER
734 Fifteenth Street, N.W.
Washington, D.C. 20005

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1051

BESSIE B. GIVHAN,
Petitioner,

v.

WESTERN LINE CONSOLIDATED SCHOOL DISTRICT ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, pp. 1a-26a)[1] is reported at 555 F.2d 1309. The district court's Memorandum Decision (Pet. App. B, pp. 27a-40a) is unpublished.

---

[1] Citation is to the appendix to the petition for certiorari. The joint appendix is cited as "App." followed by the page reference. The record is cited as "R." followed by the page reference.

JURISDICTION

The judgment of the court of appeals was entered on July 18, 1977. Pet. App. C, pp. 41a-42a. A timely petition for rehearing and suggestion for rehearing en banc was denied on October 27, 1977. Pet. App. D, pp. 43a-44a. A timely petition for writ of certiorari was filed on January 25, 1978, and was granted on April 3, 1978. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1) (1970).

QUESTION PRESENTED

Whether a teacher's statements criticizing practices in her school which she believes to be racially discriminatory are protected by the First Amendment where those statements are communicated to her principal rather than presented in a public forum.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Amendment I:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

U.S. Constitution, Amendment XIV:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Revised Statutes, § 1979, 42 U.S.C. § 1983 (1970):

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

STATEMENT OF THE CASE

This case arises from the decision by school officials in a Mississippi school district, made during the process of school desegregation, refusing to reemploy a concededly competent black teacher, petitioner Bessie B. Givhan, because she urged her principal to modify practices in her school which she believed to be racially discriminatory. Pet. App. 9a, 35a-36a.[2] Petitioner intervened in a pending desegregation case against the school district, *Ayers* v. *Western Line Consolidated School Dist. et al.*, No. GC-66-1-S (N.D. Miss.). App. 14. Her complaint in intervention alleged, *inter alia*, that the decision to terminate her employment violated the First and Fourteenth Amendments to the Constitution and R.S. § 1979, 42 U.S.C. § 1983. The district court granted judgment for Mrs. Givhan. It found that "the primary reason for the school district's failure to renew Givhan's contract was her criticism of the policies and practices of the school district, especially the school to which she was assigned to teach . . . [and] that the school district's motivation in failing

---

[2] Respondents are the Western Line Consolidated School District, Mississippi; its Superintendent, Harold N. Adams; its Board of Education; the members of its Board of Education, H. T. Cochran, W. T. Eifling, Chalmers Hobart, Wynn Starnes, Clyde Nichols, and Ivory Walker, Sr.; and James S. Leach, Principal of Glen Allan Attendance Center, a school operated by the respondent school district.

to renew Givhan's contract was almost entirely a desire to rid themselves of a vocal critic of the district's policies and practices which were capable of interpretation as embodying racial discrimination." Pet. App. 35a-36a. The court of appeals reversed. It concluded that the district court's findings were not clearly erroneous but that neither a teacher nor a citizen has a First Amendment interest in making complaints to a principal. Pet. App. 8a-11a, 13a, 19a.

The Evidence At Trial

For six and one-half years, Mrs. Givhan taught English in a black school operated by respondent Western Line Consolidated School District. Pet. App. 2a, 4a. In the wake of this Court's decision in *Alexander* v. *Holmes County*, 396 U.S. 19 (1969), the district court ordered the school district to desegregate its faculty no later than February 1, 1970, and its student body no later than February 9, 1970. App. 4, 8-9. At that time Mrs. Givhan was assigned to an integrated school for the remainder of the 1969-70 school year. App. 121-33. Thereafter, she was assigned to another integrated school, Glen Allan Attendance Center, for the 1970-71 academic year. App. 140. Throughout the academic years 1969-70 and 1970-71, "[t]here were several incidents of student and teacher demonstrations and other unpleasant manifestations of general discontent and unrest among the black community as to the course of the desegregation" of the district. Pet. App. 35a. At the conclusion of the 1970-71 academic year, her new white principal, James Leach, recommended to the superintendent that Mrs. Givhan's contract not be renewed for the 1971-72 school year. The superintendent acquiesced in this recommendation, and thus Mrs. Givhan's employment terminated at the end of the 1970-71 school year. Pet. App. 4a, 8a.

The principal's avowed reasons for not recommending Mrs. Givhan were set forth in a letter to the superintendent dated May 1, 1971:

> "Mrs. Givhan is a competent teacher; however, on many occasions she has taken an insulting and hostile attitude toward me and other administrators. She hampers my job greatly by making petty and unreasonable demands. She is overly critical for a reasonable working relationship to exist between us. She also refused to give achievement tests to her homeroom students." App. 44.

In response to Mrs. Givhan's request for a statement of reasons, the superintendent said that contracts are renewed only for teachers who have been recommended by the principal and superintendent and that

> "Our records reflect that the reason why you were not recommended for re-hiring were: (1) a flat refusal to administer standardized national tests to the pupils in your charge;[3] (2) an announced intention not to co-operate with the administration of the Glen Allan Attendance Center; (3) and an antagonistic and hostile attitude to the administration of the Glen Allan Attendance Center demonstrated throughout the school year." App. 45.

At trial the principal was asked to name the "demands" he had referred to in his letter of May 1.[4] He testified

---

[3] At trial Mrs. Givhan testified that she did indeed administer the standardized tests to her students and that she did not announce that she would refuse to give the tests. App. 143-46. Prior to administering the tests, Mrs. Givhan had stated that the testing program should have been conducted by the guidance counselor rather than the teachers. App. 144.

[4] These "demands" evidently were stated in writing as well as orally. A letter by the principal to the superintendent states that "I was handed a list of requests from Mrs. Givhan recently, and some of these were reasonable requests for supplies, etc., but some were unreasonable in my opinion." App. 29.

that Mrs. Givhan requested that black Neighborhood Youth Corp (NYC) workers be assigned to office work as well as to janitorial tasks. App. 68.[5] He believed the NYC workers were not qualified for office work. *Id.*

The only other "demand" identified by the principal was Mrs. Givhan's request that "we place black people to take up [lunch] tickets in the cafeteria." App. 68.[6] The principal acknowledged:

> "There were not so many demands. Most of the demands that came through were—she would have a list of them and I would refer them up to the Superintendent. It was mostly the arrogance and antagonistic and hostile relationship that existed that were the main things involved." App. 69.

In this connection, the principal testified that on one occasion Mrs. Givhan said "I received your little memorandum" and threw it on his desk. App. 68. Mrs. Givhan did not recall making such a statement. App. 117. In addition, Mrs. Givhan denied feeling hostile toward school personnel and testified that she believed she had a "good relationship" with the principal. App. 117, 118.

The District Court's Findings and Conclusions

The district court first discussed two alleged bases for the refusal to renew Mrs. Givhan's contract which were not relied upon in the letters of either the principal or

[5] Mrs. Givhan testified that, in order to integrate office personnel, she requested that NYC workers "be used not only to do janitorial services but also to do little office work, such as pass out absentee slips, you know, and jobs of that type." App. 116.

[6] Mrs. Givhan testified that she informed Mr. Leach "that whites were in all choice positions," including the principalship, the secretary, the head counselor, as well as cafeteria ticket takers. App. 116-17. She testified that "When [students] see all white faces in the administration, it wasn't good for the atmosphere of the learning for the children." App. 116.

superintendent (*supra*, p. 5), but with respect to which evidence was offered at trial. First, the court considered the defendants' charge that on one occasion "Givhan failed to cooperate with the school administration in a weapons shakedown." Pet. App. 34a. The court found that the shakedown incident neither "served, or should have served, as a reason for the decision not to re-hire Givhan for the 1971-72 school year." Pet. App. 34a. The district court pointed out that the incident occurred in an earlier school year at a different school headed by a different principal, and Mrs. Givhan was recommended for contract renewal after the incident occurred.[7] Second, the court considered the claim, first made at trial, that Mrs. Givhan graded her students' papers in a racially discriminatory manner. The district court found the testimony offered in support of this charge "insufficient and inconclusive."[8] Pet. App. 34a.

Addressing the reasons for nonrenewal actually assigned in the letters of the principal and the superintendent, the court found that the testimony relating to the alleged refusal to administer a test was in "sharp conflict." Pet. App. 35a. Finally, turning to the "primary reason for the school district's failure to renew Givhan's contract," the court stated:

> "In [principal] Leach's words, Givhan was not rehired because she was constantly 'making petty and unreasonable demands.' The court finds that Givhan's 'demands' were not constant; Leach being able to testify specifically as to but two occasions. The court finds that those of Givhan's 'demands' as were specifically brought to the court's attention were neither 'petty' nor 'unreasonable', insomuch as all the com-

[7] The evidence shows that the superintendent was advised of the shakedown incident at the time it occurred. See Defendants' Exhibit 11 which is a memorandum dated March 17, 1970.

[8] The testimony appears at App. 126-35, 153, 154-55.

plaints in question involved employment policies and practices at Glen Allan school which Givhan conceived to be racially discriminatory in purpose or effect." Pet. App. 35a.

". . . [W]hen the school district's decision to terminate Givhan's employment is placed into a setting contemporaneous with its conception and execution, it becomes clear to the court that the school district's motivation in failing to renew Givhan's contract was almost entirely a desire to rid themselves of a vocal critic of the district's policies and practices which were capable of interpretation as embodying racial discrimination." Pet. App. 35a-36a.

Relying on *Pickering* v. *Board of Education*, 391 U.S. 563 (1968), and *Perry* v. *Sindermann*, 408 U.S. 593 (1972), the district court concluded that the termination of Mrs. Givhan's employment violated rights secured by the First Amendment, entered judgment for plaintiff Givhan, and granted her backpay, reinstatement and attorneys' fees. Pet. App. 35a-36a; R. 509-11.

The Court of Appeals' Decision

The court of appeals concluded that the district court's finding that Leach and the board were motivated primarily by Givhan's "demands" in refusing to rehire her, was not clearly erroneous. Pet. App. 11a. The court of appeals noted that the district court (which had rendered judgment in this case prior to this Court's decision in *Mt. Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274 (1977)), had not made an express finding as to whether the same decision would have been made without regard to the "demands." Pet. App. 11a. The court of appeals concluded, however, that

"on this record the appellants do not, and seriously cannot, argue that the same decision would have been made without regard to the 'demands.' Appellants

seem to argue that the preponderance of the evidence shows that the same decision would have been justified, but that is not the same as proving that the same decision would have been made." Pet. App. 11a.

Nevertheless, the court of appeals reversed the judgment of the district court on the ground that Mrs. Givhan's expressions were not constitutionally protected. Pet. App. 19a. The court found a "strong implication" in this Court's decisions in *Pickering* v. *Board of Education*, 391 U.S. 563 (1968); *Perry* v. *Sindermann*, 408 U.S. 593 (1972); and *Mt. Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274 (1977), that "private expression by a public employee is not constitutionally protected." Pet. App. 16a. Additionally, it found that *Madison School District* v. *Wisconsin Employment Relations Commission*, 429 U.S. 167 (1976), adds "support" to the "dichotomy," for purposes of constitutional protection, between public and private speech by public employees. Pet. App. 16a-18a.

The court of appeals also reasoned that "no one has a right to press even 'good' ideas on an unwilling recipient," citing *Rowan* v. *United States Post Office Department*, 397 U.S. 728, 737 (1970), and Justice Douglas' concurring opinion in *Lehman* v. *City of Shaker Heights*, 418 U.S. 298, 305, 307 (1974). Pet. App. 18a. While recognizing that "*Rowan* is arguably distinguishable because of the citizen's compelling interest in privacy within his or her own residence," the court stated that "[t]he rationale of *Rowan*, however, is not limited to the home. It applies whenever 'the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure,'" citing *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205, 209 & n. 5 (1975). Pet. App. 18a n.16. The court of appeals felt that this principle was applicable to this case, stating:

> "While an intrusion on privacy in the home may be of greater significance than an intrusion on privacy in the workplace, one's 'degree of captivity' in the workplace may be much greater. In the normal course of his job, principal Leach could hardly avoid exposure to teacher Givhan and her demands, requests, and complaints. Indeed, as a practical matter Leach was a very captive audience for Givhan as long as they both worked in the same school." Pet. App. 18a n.16.

The court of appeals, however, recognized that its rationale was not confined to public employees who might otherwise hold their superiors "captive." Rather, the court expressly declared that

> "[n]either a teacher *nor a citizen* has a constitutional right to single out a public employee to serve as the audience for his or her privately expressed views, at least in the absence of evidence that the public employee was given that task by law, custom, or school Board decision." Pet. App. 19a (emphasis added).

While recognizing that "[m]any, if not most people would consider Givhan's expressions laudable," the court of appeals was concerned that "[i]f we held Givhan's expressions constitutionally protected, we would in effect force school principals to be ombudsmen, for damnable as well as laudable expressions." Pet. App. 19a-20a.

The court of appeals acknowledged that this case "could be" one of those "hard cases [that] make bad law" (Pet. App. 19a); and one member of the court, Roney, J., specially concurred because there are "probably many occasions when First Amendment constitutional protection will reach private expression by a public employee, but I agree that the district court erred in casting this case in the First Amendment terms." Pet. App. 26a.

ARGUMENT

I. MRS. GIVHAN'S CRITICISM OF SCHOOL POLICY DID NOT LOSE ITS STATUS AS PROTECTED SPEECH MERELY BECAUSE SHE DID NOT PUBLICIZE HER VIEWS.

Under the decision of the court of appeals, the First Amendment does not protect a public employee's suggestions or criticisms concerning the policies of his or her government agency—regardless of the importance of the issue or the merit of the suggestion—if the employee privately expresses those views to a superior rather than presenting them in a public forum. This ruling unwarrantedly excises from the scope of the First Amendment a substantial and significant form of speech that is of potentially great value in contributing to enlightened decision-making by public officials.

The categories of speech which are per se unprotected by the First Amendment are few. Freedom of speech has been the rule, *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495, 503 (1952); the exceptions have been limited to "well defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any constitutional problems." *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 571-72 (1942); *Beauharnais* v. *Illinois*, 343 U.S. 250, 266 (1952). Thus, obscenity, fighting words, and malicious defamation have been denied constitutional protection on the theory that these types of speech "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Chaplinsky, supra*, 315 U.S. at 572.

Private utterances do not fall within the rare categories of expression excepted from First Amendment protection. Only recently, this Court ruled that even a law-

yer's "in-person solicitation" of employment is "speech" and is entitled to "some constitutional protection" notwithstanding the commercial nature of such speech. *Ohralik* v. *Ohio State Bar Association*, 46 U.S.L.W. 4511, 4514 (1978).

Nor is speech excepted from First Amendment protection because it is directed personally to a public official rather than voiced in a public forum. To the contrary, this Court has held that the First Amendment protected the nonprovocative objections voiced by an individual to a police officer who was then detaining him. *Norwell* v. *Cincinnati*, 414 U.S. 14 (1973). See also *Lewis* v. *New Orleans*, 415 U.S. 130 (1974).

The court of appeals, nevertheless, concluded that a public employee's "private expression" to his superior "is not constitutionally protected." Pet. App. 16a. To the extent the court of appeals rested its conclusion on what it termed a "strong implication" in this Court's decisions in *Pickering*, *Sindermann*, *Doyle*, and *City of Madison School District* that private expression by a public employee is not protected, the court's conclusion was unwarranted. Each case dealt only with the protection that the First Amendment affords to a teacher's public criticism of school policies, and this Court thus had no occasion to consider whether private speech by a teacher was protected. In the only case in which the Court has explicitly mentioned private speech by teachers, it said "every public employee is largely free to express his views, in public *or private*, orally or in writing." *Abood* v. *Detroit Board of Education*, 431 U.S. 209, 230 (1977) (emphasis added).

The court of appeals also withheld protection from a public employee's "private expression" to his superior for fear that such protection would create a right of access to public officials such as principal Leach. The court said that "[n]either a teacher nor a citizen has a constitutional right to single out a public employee to serve as the audience for his or her privately expressed views, at least in the absence of evidence that the public employee was given that task by law, custom, or school Board decision." Pet. App. 19a.

This reasoning rests on an erroneous premise. A holding that the private expression of views to a public official implicates a First Amendment interest need not imply a constitutional right to an audience with that official.[9] *Cf. Pell* v. *Procunier*, 417 U.S. 817, 834 (1974); *Houchins* v. *KQED, Inc.*, No. 76-1310, slip op. at 10 (U.S. June 26, 1978). Whether and in what circumstances school officials can deny teachers access to their principals for private speech is not the issue presented by this case. This Court is confronted with a simpler issue—whether in the absence of regulations or directives governing access to her principal, a teacher accorded such access could be punished by school authorities for speaking to him on matters of school policy.

A citizen's criticism directed privately to a public official concerning an issue of public policy within that official's purview lies at the core of the values protected by the First Amendment. In the House debates on that

[9] By the same token, a holding that the private expression of views to a public official implicates a First Amendment interest need not imply that public employees have a right to abuse whatever natural access they may have to their superiors as a result of the working relationship. *Pickering* makes clear that an employee's speech right is not absolute and that the school district's interest in efficient operation of the schools must be weighed against the free speech interest of a teacher. 391 U.S. at 568. Additionally, this Court has held that speech may be limited by reasonable time, place and manner regulations. *Grayned* v. *City of Rockford*, 408 U.S. 104, 115-17 (1972); *Police Dept. of Chicago* v. *Mosley*, 408 U.S. 92, 98 (1972). Thus, the court of appeals' concern that a principal may become a "captive audience" for a teacher under his supervision does not warrant its sweeping rule that the Constitution affords no protection at all to private expression by public employees to their superiors.

Amendment, Thomas Tucker of South Carolina moved to add language that would expressly secure the people's right "to instruct their representatives." James Madison, who drafted the First Amendment, opposed the motion, saying:

> "The right of freedom of speech is secured; the liberty of the press is expressly declared to be beyond the reach of this Government; the people may therefore publicly address their representatives, *may privately advise them,* or declare their sentiments by petition to the whole body; in all these ways they may communicate their will." 1 Annals of Cong. 766 (Gales & Seaton eds. 1789) (emphasis added).

Indeed, when speech is closely tied to the governmental process, it merits the highest standard of protection afforded under the First Amendment. Just last term, this Court ruled that when "a prohibition is directed at speech itself, and the speech is intimately related to the process of governing, 'the State may prevail only upon showing a subordinating interest which is compelling.'" *First National Bank of Boston* v. *Bellotti*, 46 U.S.L.W. 4371, 4377 (1978), quoting *Bates* v. *Little Rock*, 361 U.S. 516, 524 (1960).[10]

Bellotti involved speech that was directed to the public in connection with a referendum and was therefore "intimately related to the process of governing" in the sense of self-governance. But in today's complex society, self-

[10] Although this case involves punishment for speech rather than a direct prohibition on speech, as was the case in *Bellotti*, this Court has made it clear that

> "if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to 'produce a result which [it] could not command directly.' *Speiser* v. *Randall*, 357 U.S. 513, 526. Such interference with constitutional rights is impermissible." *Perry* v. *Sindermann*, 408 U.S. 593, 597 (1972).

governance constitutes only a fraction of the "process of governing." Another major component of the process is decisionmaking by elected and appointed officials charged with executing the will of the electorate embodied in legislation. Today the "marketplace of ideas" includes the channels by which information is communicated to these officials as well as directly to the people.[11] Thus, this Court has recognized that there is a First Amendment interest in promoting enlightened decisionmaking by those officials as well as by the public. In holding that a teacher's speech at a public school board meeting was protected, this Court observed that "restraining teachers' expressions *to the board* on matters involving the operation of the schools would seriously impair the board's ability to govern the district." *Madison School District* v. *Wisconsin Employment Relations Commission*, 429 U.S. 167, 177 (1976) (emphasis added).

Quiet dialogue with public officials may often serve the end of enlightened decisionmaking by those officials as well as or better than public expression. Neither a public employee nor any other citizen can be assured that even a meritorious suggestion will be aired by the media. He may have to compete for space or broadcast time with issues and events of a more sensational nature. Even where he has access to the media, he may choose to express his views quietly to a public official in recognition that publicity does not necessarily make one's views more cogent, a public official more responsive to meritorious

[11] See Emerson, *The System of Freedom of Expression*, 570-71 (1970):

> "There remains room within the governmental bureaucracy for the operation, at least on a limited scale, of the system of free expression. Not only do the fundamental objectives of the First Amendment require this, but the vitality and ultimate effectiveness of the government service depend upon it. Except where the necessities of the employment relation demand otherwise, freedom of expression within the bureaucracy should be encouraged and protected."

criticism, or a policy more amenable to change. Where he anticipates that public exposure of his concern would needlessly embarrass public officials or other citizens or stiffen opposition to suggested reforms, the wiser and more effective course may be to present those concerns privately. Where, as here, a school district is in a period of racial conflict accompanying desegregation, a citizen may, as Mrs. Givhan did, reasonably decide to take her criticism of school policy to the principal rather than to a public forum.

Where a public employee is involved, he may reasonably conclude that maintenance of a mature, professional relationship with a superior requires the employee, at least initially, to treat directly with his superior on issues affecting the operation of his agency rather than to use the media as an intermediary. Additionally, he may choose internal communication out of a sense of loyalty, fair play, personal reticence or fear of reprisal.[12]

A rule denying constitutional protection to communications by a public employee to his superior would thus tend to deprive the employer of useful information and suggestions concerning agency policy and in turn to deprive the public of fully informed decisionmaking by the responsible public officials. As this Court has recognized, "[t]eachers are, as a class, the members of a community most likely to have informed and definite opinions" on matters of school policy. *Pickering, supra*, 391 U.S. at 572. Faced with the choice of publicly criticizing the policies of his

[12] See "The Whistleblowers, A Report on Federal Employees Who Disclose Acts of Governmental Waste, Abuse, and Corruption," prepared for the Senate Committee on Governmental Affairs, 95th Cong., 2d Sess., p. 22 (Feb. 1978), which explains:

> "The decision to go outside . . . dramatically increases the employee's vulnerability to harassment and reprisals. Although it may appear that very little protection is afforded the employee who voices disagreement internally, even less is provided when outside contact is utilized."

superiors or remaining silent, a teacher or other public employee may well choose silence.

To expose public employees to punishment for internal communications would be detrimental to the public's interest in ensuring that inadequacies in public service be brought to the attention of responsible officials. So important is this public interest that "The Whistleblowers, A Report on Federal Employees Who Disclose Acts of Governmental Waste, Abuse, and Corruption," prepared for the Senate Committee on Governmental Affairs, states that "[i]t is the *duty* of all federal employees to make known examples of governmental waste, misfeasance, or malfeasance to which they have been exposed during the course of their employment," and that "[t]he first step in a federal employee's attempt to eliminate governmental waste, misfeasance or malfeasance, should be to bring the problem to the attention of those officials most able to resolve it—the policy makers within the agency." *Id.* at 10-11 (emphasis added). The Report goes on to emphasize that "Agency heads who are made aware of a problem can be held accountable for its resolution." *Id.* at 11. This pinpointing of responsibility will contribute to the enlightenment of the citizenry should the employee find it necessary to make his views public.

The Fifth Circuit's blanket rule denying protection to all private expression directed to public officials is also objectionable because it would afford those officials abundant opportunity to condemn ideas and punish public employees and citizens capriciously. Under that ruling, the First Amendment would not prevent a municipal government from revoking a citizen's library privileges or trash collection services because he complained to an official reasonably perceived by the citizen to be the appropriate recipient of his complaint. Similarly, a citizen who chanced to sit next to the Secretary of HEW on a plane could put his Social Security benefits in jeopardy

by making suggestions for improving the administration of the department.

In the case at bar, the employee's statements to her principal occurred when the school district, after having resisted desegregation for many years, was converting to a unitary system. Mrs. Givhan, a black teacher, recommended to her white principal that black persons should be included in "choice" positions in the school. App. 116-17. No school policy or rule forbade teachers from discussing educational or other policy with their principals,[13] and there is no indication that principal Leach ever warned Mrs. Givhan not to discuss such matters. Mrs. Givhan's comments were neither intrinsically provocative nor harmful. As the Fifth Circuit observed, "[m]any, if not most people would consider Givhan's expressions laudable." Pet. App. 19a. To permit school officials to terminate a teacher's employment under these circumstances is to vest in those officials the discretion to punish speech according to the race of the speaker and the content of the speech. The Fifth Circuit's ruling contains the "distinct potential . . . for permitting discretionary enforcement against unpopular causes," *In re Primus*, 46 U.S.

[13] To the extent that school policy dealt with such communications, it appears to have encouraged dialogue between teachers and principals. Bessie Givhan testified that she understood that in making complaints she was to go through the chain of command, meaning that she was to take such matters up with the principal. App. 147. One of the District's teacher evaluation instruments stated that a teacher's knowledge, acceptance, and execution of school policy would be evidenced by conduct such as

> "Faithful and willing support of policies and program even to point of recommending change (loyalty)
>
> * * * *
>
> "Contributes to decision making when opportunity is provided and to implementation of decisions and policies made." R. 302.

The instrument also set store on a teacher's "Moral Courage (intellectual honesty, willing to stand up and be counted)," and on a teacher's sensitivity "to the needs for self and school evaluation and improvement. . . ." R. 303-04.

L.W. 4519, 4625 (1978), and for permitting such officials to "prescribe what shall be orthodox." *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624, 642 (1943); *Police Dept. of the City of Chicago* v. *Mosley*, 408 U.S. 92 (1972).

In sum, the Fifth Circuit's rule is inconsistent with sound government and the values and purposes of the First Amendment. The fact that Mrs. Givhan did not press her free speech right to the fullest extent should not be used to deny her speech any protection at all.[14]

II. THE *PICKERING* BALANCE REQUIRES AFFIRMANCE OF THE DISTRICT COURT'S JUDGMENT.

As we have shown, Mrs. Givhan's criticism of school policy did not fall within a category of expression outside the scope of the First Amendment. Accordingly, the balancing test set forth in *Pickering* must be applied.[15] In our view, the record makes clear that under *Pickering*'s balancing test, the judgment of the district court must be affirmed.

There is no evidence credited by the district court satisfying the school district's burden of showing that Mrs. Givhan's expressions "either impeded [her] proper

[14] While each of the lower courts confined its analysis of the case to the speech clause, Mrs. Givhan's written and oral communications to her superior (see note 4, *supra*) also implicated the "petition" clause of the First Amendment. See *Jannetta* v. *Cole*, 493 F.2d 1334, 1337 n. 5 (4th Cir. 1974); *Swaaley* v. *United States*, 376 F.2d 857, 863 (Ct. Cl. 1967); *Burkett* v. *United States*, 402 F.2d 1002, 1003-04, 1007-08 (Ct. Cl. 1968); *Jackson* v. *United States*, 428 F.2d 844, 848 (Ct. Cl. 1970). *Cf. California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508, 510 (1972).

[15] In *Pickering*, the Court said:

> "The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees" 391 U.S. at 568.

performance of [her] daily duties in the classroom or . . . interfered with the regular operation of the schools generally." *Pickering, supra*, 391 U.S. at 572-73. See *Tinker* v. *Des Moines School Dist.*, 393 U.S. 503, 508-09 (1969).[16] The district court expressly considered the school district's claims that Mrs. Givhan's so-called "demands" were "petty," "unreasonable," and "constant," and rejected each of them. Pet. App. 35a. Here, as in *Mt. Healthy* v. *Doyle*, there is no suggestion by the school district that the teacher "violated any established policy," or that the reaction of the school officials to the teacher's communication "was anything more than an *ad hoc* response" to the teacher's expression. 429 U.S. at 284. Indeed, there is no evidence showing that Mr. Leach was concerned enough to have warned Mrs. Givhan against criticism of school policy or that he took measures to disengage himself from conversation with her. In sum, the school district failed to show that its interest in the efficient operation of the school had been impaired by Mrs. Givhan's expression.

Even had the requisite impairment been shown, *Pickering* would require weighing that impairment against the interests of Mrs. Givhan and the public in her speech. See Note, "The Nonpartisan Freedom of Expression of Public Employees," 76 Mich. L. Rev. 365, 381-82 (1977). Here, those interests were of the highest order.

First, Mrs. Givhan's speech was "intimately related to the process of governing" the school district. *First National Bank of Boston* v. *Bellotti, supra*, 46 U.S.L.W. at 4377. Second, to her credit, she framed her criticism to avoid public embarrassment to her principal and inflammation of racial tensions existing in the community as a result of the court-ordered desegregation. Third, as a teacher with substantial experience teaching black children, and whose experience included teaching in segregated and desegregated schools, Mrs. Givhan was among those members of the community who were most likely to have an informed opinion concerning the harm to black children from confining blacks exclusively to menial jobs within the schools and restricting choice positions to whites. *Cf. Pickering, supra*, 391 U.S. at 572. Finally, in discussing such matters with her principal, she was seeking to protect the civil rights and advance the educational interests of the children at her school. *Rogers* v. *Paul*, 382 U.S. 198, 200 (1965). The Ninth Circuit in *Bernasconi* v. *Tempe Elementary School Dist. No. 3*, 548 F.2d 857 (1977), placed heavy, if not decisive weight, on this factor. There a school teacher and counselor was sanctioned because she opposed classifying Mexican-American students as mentally retarded on the basis of English language tests. In striking the *Pickering* balance for the teacher, the district court considered "the nature of the problem to which the plaintiff's communications addressed themselves" to be "[a]n important factor." *Id.* at 862. The court of appeals affirmed, saying

> "the School District's interest in being free from general criticism cannot outweigh the right of a sincere, educational counselor to speak out against a policy she believes to be both harmful and unlawful." *Id.*

In sum, on the evidence credited by the district court, the *Pickering* balance can only be struck in Mrs. Givhan's favor.

[16] Relying on *Tinker*, many courts have concluded that speech-based discipline of a teacher cannot stand unless the expression "materially and substantially" disrupts the educational process. *E.g., Smith* v. *Losee*, 485 F.2d 334, 339 (10th Cir. 1973) (en banc); *Mabey* v. *Reagan*, 537 F.2d 1036, 1047-50 (9th Cir. 1976); *Fluker* v. *Alabama State Board of Education*, 441 F.2d 201, 206 (5th Cir. 1971); *Los Angeles Teachers Union* v. *Los Angeles City Board of Education*, 71 Cal. 2d 551, 563, 455 P.2d 827, 835, 78 Cal. Rptr. 723, 731 (1969). The "material and substantial disruption" test has also been applied in cases involving other public employees. Note, "The Nonpartisan Freedom of Expression of Public Employees," 76 Mich. L. Rev. 365, 380-81 & nn. 66-67 (1977).

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment of the court of appeals and order that the judgment of the district court be affirmed.

Respectfully submitted,

DAVID RUBIN
1201 Sixteenth Street, N.W.
Washington, D.C. 20036

STEPHEN J. POLLAK
RICHARD M. SHARP
734 Fifteenth Street, N.W.
Washington, D.C. 20005

FRED L. BANKS
318 East Pearl Street
Jackson, Mississippi 39205

Attorneys for Petitioner

Of Counsel:

SHEA & GARDNER
734 Fifteenth Street, N.W.
Washington, D.C. 20005

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1051

BESSIE B. GIVHAN,

Petitioner,

v.

WESTERN LINE CONSOLIDATED SCHOOL DISTRICT, et al.,

Respondents.

BRIEF OF RESPONDENTS

J. ROBERTSHAW
Commercial National Bank Building
Greenville, Mississippi 38701

Attorney for Respondents

Of Counsel:

ROBERTSHAW & MERIDETH
P.O. Drawer 1498
Greenville, Mississippi 38701

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1051

BESSIE B. GIVHAN,
Petitioner,

v.

WESTERN LINE CONSOLIDATED SCHOOL DISTRICT, et al.,
Respondents.

BRIEF OF RESPONDENTS

PRELIMINARY ANALYSIS

From respondents' point of view, this case is unique in that in two successive decisions, Courts have rendered decisions based upon points not argued or seriously pressed by *either* party. The District Court rendered a decision on petitioner's claims on a basis of an invasion of her First Amendment rights, a point not briefed or argued by either side.[1] In fact, the entire thrust of petitioner's case at the District Court level, and the entire

[1] App., 211-213. For convenience, we adopt the system of citations used by Petitioner. Citations to appendices of respondent's brief in opposition to petition for writ of certiorari will be, "Res. App." followed by the roman numeral and page citations. Citations to the appendix filed with the Court of Appeals will be "CA. App.", followed by the page reference.

thrust of the voluminous discovery was directed at the alleged violation of the *Singleton III* type[2] decree. For example, on trial petitioner introduced no evidence on, and did not allude to her charges of First Amendment invasion in paragraphs XIX-XXI of the intervention complaint.

This case was decided by the District Court on July 2, 1975. Under the then state of law, except as limited by *Pickering* v. *Board of Education*, 391 U.S. 563 (1968), discharge of a teacher predicated upon exercise of First Amendment rights could not stand. *Perry* v. *Sinderman*, 408 U.S. 274 (1972). The case was argued to the Court of Appeals for the Fifth Circuit on April 21, 1977. In the interim, *Mt. Healthy City Board of Education* v. *Doyle*, 429 U.S. 274 (1977), was decided, holding in essence that a teacher should not be placed in a better position because of exercise of First Amendment rights, and that a decision not to renew a non-tenured teacher's contract would not amount to a constitutional violation justifying remedial action *if* the board, in fact, would have reached the same decision not to renew in any event. *Doyle* requires specific findings on both.

Respondent's argument to the Court of Appeals was: (1) that petitioner's communications were not protected by the First Amendment, because respondent's objections were to the context in which they were made and the manner in which they were made, not to their *content*; (2) that petitioner's conduct made it impossible for a reasonable working relationship to exist between her and the principal; and (3) that in all fairness to respondents, the case should be remanded to the District Court for

[2] *Singleton* v. *Jackson Municipal Separate School District*, 419 F.2d 1211 (5th Cir., 1969), *rev. and remanded sub nom. Carter* v. *West Feliciana Parish School Board*, 396 U.S. 290 (1970), on remand, 425 F.2d 1211 (5th Cir., 1970). The *Singleton III* provisions were contained in the District Court order of January 12, 1970. App., 3-7.

further development of the reasons for petitioner's discharge in light of the intervening decision in *Doyle*. *Stewart* v. *Bailey*, 561 F.2d 1195 (5th Cir., 1977).

Thus, to the extent that the Court of Appeals holds in this case that *no* private expression by a public employee is protected by the First Amendment, we must, in all candor, agree with petitioner and the *Amici Curiae* that the case is wrong; however, to the extent it holds that *petitioner's* speech and conduct is not protected by the First Amendment, and that the case never should have been cast in First Amendment terms, we think the case is right and should be affirmed.[3]

STATEMENT OF THE CASE

Respondents have, at all times before and since commencement of the base action in which petitioner intervened, acted in complete good faith in meeting the problems created by the need for desegregation and in proceeding forthrightly to provide a quality education within the framework imposed by the successive court orders.[4]

[3] Being put in the position of defending a ruling we did not seek and cannot in good conscience support, we feel akin to the situation of one of Mark Twain's characters who, having been tarred and feathered and being ridden out of town on a rail, may have commented, "If it waren't for the honor of it, I'd just as soon walk."

[4] Judge Clayton, in the first definitive order entered in the base action on August 10, 1966, made specific findings of fact along these lines. The relevant portion of his Memorandum Order is reproduced in Res. App., I, pp. 1a-6a. Respondents are proud of their record in this respect, and proud of the fact that Washington County and Greenville have *always* been leaders in racial harmony, and that responsible citizens (both black and white) have been willing to and have assumed roles of leadership to this end. While respondents do not desire to ride on Greenville's coattails, being only a small frog in a large pond, they have not enjoyed the publicity accorded the county's major municipality. For what it may be worth, see: "A Report on Equal Protection in the South", U.S. Commission on Civil Rights (Nov. 4, 1965), pp. 94-97; "School Desegregation in Greenville, Mississippi", U.S. Commission on Civil Rights Staff Report (August, 1977).

The task has not been an easy one.

As specifically related to this action, during the first semester of the 1969-70 year, respondents were in a freedom-of-choice configuration. The Glen Allan center served grades 1-12 and had 510 students, all black.

Following the order of January 21, 1970, the second semester began with Glen Allan serving grades 1-6, only, with 309 black pupils and 96 white [R., 63], with 12 black teachers and 11 white teachers [R., 64]. All schools in the district were re-constituted with O'Bannon serving grades 1-6 for all students in the northerly portion, and Riverside serving all students of the entire district in grades 7-12. In mid-stream, so to speak, all physical equipment (desks, lab equipment, library books, etc.) was re-distributed and all teachers were re-assigned to agree with elementary schools located at the upper and lower ends of the district and a single secondary school in the middle.

The predictable result was utter chaos, and on June 29, 1970, the District Court entered an order agreed to by both plaintiffs and defendants, re-constituting the district into three geographical attendance zones, each with an attendance center serving grades 1-12 [R., 66].

During the first semester of 1969-70, petitioner had taught at O'Bannon in the northerly part of the district; during the second semester, she taught at Riverside in the middle; at the opening of the 1970-71 session, petitioner was assigned to Glen Allan. It was following this school session that petitioner's contract was not renewed.

When Glen Allan was opened for business in the fall of 1970, it had moved from a freedom-of-choice, 12-grade center in the first semester of the preceding year to a geographically assigned student body, 1-6 grade center

in the second semester, and to a geographically assigned student body, 1-12 grade center the first semester of 1970-71.

91.5% of the student body was black [R., p. 70]. 15 of the 22 black teachers were new to Glen Allan and the system; 1 of the 7 permanently assigned white teachers was new.[5] The entire concept of a totally integrated school was brand new to the teachers, the students and the community, except for the debacle of the preceding semester.

When Leach was assigned to Glen Allan, the school had been in operation for four or five weeks without a principal. Both students and faculty had been "stirred around" three times in the space of less than one year. He had been advised "that conditions were bad" and found, on his arrival, no order or discipline, "the students were more or less walking the halls, the teachers were not properly staying in their classrooms to teach, and there appeared to be a hostile attitude between maybe—between the blacks and the whites. * * * there would be groups of older students kind of getting in gangs in the halls and it would be hard to break them up. And there were threats made by students. And there was a lack of cooperation, it seemd like, among the teachers to help." [App., pp. 79-80]

This, then, is the atmosphere in which respondents were given the task of making total integration work, and these are the conditions under which respondents had to go about the mission of providing a quality education to the pupils in their charge. This is the context in which petitioner's communications, for which First Amendment protection is claimed, were made.

---

[5] Disregarding "fractional" teachers; i.e., teachers working part time at Glen Allan and part time at another attendance center. Data is from Stipulated Exhibit 4, CA App., p. 331.

SUMMARY OF ARGUMENT

Our position is simply, we agree that the opinion of the Court of Appeals is overly broad to the extent it holds *all* private communications between a public employee and the employer should not receive First Amendment protection, but we urge: (1) that the case, at trial level, never should have been cast in terms of the First Amendment; (2) that under the balancing test of *Pickering* v. *Board of Education*, 391 U.S. 563 (1968), the overriding need for maintenance of a viable educational system under difficult and trying circumstances outweigh petitioner's rights where her attitude was "overly critical for a reasonable working relationship to exist between [the teacher and her immediate supervisor, the principal]" [App., 44]; and (3) that if mistaken in the first two positions, in the interests of justice the case should be remanded for application of the *Doyle* two-stage inquiry into the causes for failure to renew petitioner's contract.

ARGUMENT

I

JUDGE RONEY WAS RIGHT IN HIS CONCURRING OPINION. THIS CASE NEVER SHOULD HAVE BEEN CAST IN TERMS OF THE FIRST AMENDMENT.

Throughout the period under consideration, respondents were torn between three opposing forces: (1) compliance with orders of the courts directing immediate and total integration; (2) the mores of the community, deeply rooted in generations of total segregation; and, (3) the necessity of providing a quality education to all students, black and white, in some semblance of an orderly academic atmosphere.

The circumstances existing at the opening of the first semester, 1969-70 session were tense, explosive, and not conducive to a learning situation. The first order of business *had* to be re-establishment of order and maintenance of strict discipline so that the energies of the faculty and students could be directed solely to the learning process.

We think the actions and the "communications" of petitioner evince a total lack of loyalty to respondents and to the administration. By "loyalty", we mean:

> "*Relationships*
>
> "6. *Teacher-Administrator (Loyalty).* The degree of acceptance and execution of school policy and graceful fulfillment of an assignment is an indication of the loyalty exerted by a teacher to the school district. This should be number one professional characteristic and is the leading factor in determining the success of an educational system." [6]

Measured against this standard, we refer to the following specific conduct of petitioner:

1. Under an order entered August 22, 1969, the District Court required that one out of every six full time faculty and staff members at each school be of a race different from the majority of such faculty and staff for

---

[6] In *Pickens* v. *Okolona Municipal Separate School District*, 527 F.2d 358 (5th Cir., 1976), Dr. Jere Robbins, Chairman of the Department of Education, University of Mississippi, had developed a teacher evaluation instrument analyzing performance in twenty areas, rated on a scale of 1 to 5. No teacher receiving a rating of 1 in any of three items on the instrument (physical health, mental health and teacher-administrator relationships) could be considered for re-employment. The above is a direct quote from the evaluation instrument. This instrument was found by the District Court to be neither facially nor as applied discriminatory because of race or any other impermissible reason. *Idem*. 380 F.Supp. 1036 (N.D. Miss., 1974).

the 1969-70 session, and directed implementation of an upgraded concept, proposed by respondents, for grades 1-4, supplementing the existing freedom-of-choice plan, for 1970-71. [Relevant excerpts of that order constitute Appendix A to this brief.] To comply with that order, respondents had transferred two black teachers from predominantly black O'Bannon to predominantly white Riverside centers. At a PTA meeting to explain the ungraded concept to parents, petitioner and others protested transfer of these two black teachers (as to which respondents had no choice). Petitioner and between a third and a half of those present left the meeting and attempted to disrupt it by blowing automobile horns outside the gym [App., 124-126].[7] No disciplinary action of any sort was taken by respondents.

2. Following entry of the order of January 21, 1970, directing immediate re-constitution of the district schools into two elementary centers and one secondary center, petitioner and others met and protested, among other things, the proposed scheduling and teaching assignments at the new, central secondary system [App., 121-124]. Petitioner and other teachers apparently felt they should keep the same classes and roll books [App. 123].[8] This was not helpful in meeting and working with a difficult problem.

3. As a result of this teachers' meeting, doubt had arisen in the minds of the administrators as to whether

[7] Respondents point out that the action protested by petitioner and others was action responding to a specific directive of a United States court.

[8] Had each teacher been permitted to retain the same rolls and the same pupils in their classes, the necessary result would have been three segregated secondary schools being conducted at the same place, with a triplication of teaching and material resources. Not only would such an arrangement been impossible to achieve with the physical facilities at Riverside, it also would have been given short shrift by the District Court.

these black teachers would report for work. Individual letters to petitioner and other black teachers were sent, stating that reporting for duty when the secondary school re-opened in its new configuration was a condition of their continued employment. Petitioner received such a letter [App., p. 124].

4. During March of 1970, petitioner knew there was to be a "shakedown" of students at Riverside in a search for deadly weapons. She kept a knife for one of her students until after the shakedown. Later that day, this student cut another student with the knife. [App., 136-140]. Petitioner's contract for the ensuing year was nevertheless renewed.

5. After going to Glen Allan to assume the principal's position, Mr. Leach testified he held a faculty meeting, attended by petitioner, in which she appeared hostile and inferred she didn't intend to cooperate. He testified he had a further conference with her in which she stated she did not intend to cooperate and that "she didn't like Western Line District. She didn't like Morris, who was the Superintendent, or anything connected with the system." [App., 81] Although petitioner appears to deny the specific language testified to by Mr. Leach,[9] her actual conduct appears entirely consistent with her avowed intention not to cooperate with the school administration.

6. Mr. Leach used memoranda to communicate standard instructions to teachers and testified that he sent out one reminding teachers of a scheduled six-weeks test and report cards. Petitioner accosted him in the hall, while

[9] "Q. Mr. Leach testified that you told him you didn't like Western Line, or Mr. Morris, *or anyone employed by Western Line*. Do you recall such an incident" A. I can't recall that, no. Q. Did you make *such a statement*? A. No." (Emphasis added.) [App., 119] Significantly, petitioner did not deny her announced intention not to cooperate with the administration.

classes were changing, in the presence of students,[10] and objected to the memorandum.

7. Petitioner claims First Amendment protection for her objection to the use of NYC workers [11] for janitorial services, and seems to imply that they should have been employed in the principal's office where the clerical staff and the office staff was "all white". Petitioner felt that office personnel should be better integrated.[12]

Since there were no white NYC workers, respondents obviously may not be considered guilty of discriminating against the black NYC workers in job assignments. Respondents' objection to petitioner's comments with ref-

[10] Mr. Leach's version of the encounter is contained on pages 81-82 of the Appendix; petitioner's version is on pages 146-147. The only basic conflict in the two versions is the question of whether the test was a six-weeks test or a semester test, both of which would have been scheduled before school started. Respondents regard the incident as an example of petitioner's failure to cooperate with the administration, and an incident detrimental to discipline. Teachers simply do not challenge instructions from a principal in the presence of students, particularly in the atmosphere existing at Glen Allan. "This was in the presence of students. They were gathering, looking." [Appendix, p. 82]

[11] Neighborhood Youth Corps workers were students from low-income families employed under a federal program, paid with federal funds, designed to help them stay in school. Under the applicable regulations, those working at schools were employed only at hours that would not interfere with schooling and could not be used to replace employees in existing jobs. See, generally, 29 CFR, Part 50.

[12] Mr. Leach's testimony was that the NYC workers were not qualified for office work and that all were black [App., p. 68]. The "clerical staff and the office staff" at Glen Allan consisted of a single secretary for a school with 527 pupils. Other personnel who might be considered office personnel were: the principal, white; the assistant principal (petitioner's husband), black: the elementary principal, black; an elementary supervisor who worked at both Glen Allan and Riverside, half and half, white; the guidance counselor (plaintiff Hodges), black [App., 142; R. 70, 72] This comes out to an administrative staff of one and one-half whites, three blacks and a white clerk.

erence to the NYC workers is that it constituted unwarranted interference in the operation of the school, well beyond the scope of her employment as a junior high English teacher, in a matter as to which respondents had no options [App., 68]. Under 29 CFR Section 50.10(a) NYC workers were selected and referred to Glen Allan by a designated referral agency on the basis of its individual evaluations. Petitioner offered no evidence that any NYC worker was referred as qualified for office work.

8. Petitioner complains that a white was assigned the "choice" position of taking up tickets at the school cafeteria. Whether this task was a "choice" position is a purely subjective judgment on the part of petitioner, unsupported by any evidence except her characterization. The facts are that all district cafeterias were run under supervision of a district supervisor from the Superintendent's office [R., p. 72]. The Glen Allan cafeteria ("lunchroom") was managed by a black and the ticket-taker had been appointed by the district supervisor on recommendation of the black manager. [App., p. 68-69]. The Glen Allan cafeteria staff was composed of three persons, all black [R., p. 72]. Again, respondent's objection to petitioner's comments was that they constituted unwarranted interference with the operation of the school, well beyond the scope of her employment. As to the validity of the criticism, the assignment was made at the request of the black manager under whose supervision the ticket taker worked, and had the effect of integrating an otherwise all black cafeteria staff.

9. She refused to administer a standard achievement test to her class, directed by the district central office for the purpose of measuring students' progress [App., 70-74]. Although she testified that she ultimately administered the test, all evidence is that she did, in fact, refuse to give the test, and administered it only after

arrangements had been made for it to be administered by another teacher, Mrs. Butler, who did administer the test with petitioner [App., pp. 22, 96, 146]. Respondents regard this as an example of petitioner's negative attitude and refusal to cooperate with the school administration in performance of a routine assignment, specifically within the scope of her employment. Certainly, it is *not* a "graceful fulfillment of an assignment" [*Supra*, p. 7].

10. In her complaint, petitioner alleges that she distributed to the teachers of Glen Allan school "a list of grievances developed by the Black teachers of the Western Line Consolidated School District", that she and other black teachers requested and were granted an opportunity to present these grievances to the respondents' board of trustees, and that on May 3, 1971, she circulated a bulletin to the teachers of the Glen Allan school stating that a civil rights attorney would be meeting with the district teachers on May 14th [App., pp. 23-24]. These allegations were admitted by respondents [App., p. 50]. These would constitute the type of communications protected by the First Amendment, and there is a total lack of evidence that petitioner (or any other teacher) was directly or indirectly penalized in any way, shape or fashion for the exercise of those rights.

In review, respondents would regard incidents described in numbered paragraphs 1, 2 and 10 were entitled to and did in fact receive First Amendment protection. Respondents would regard the possible failure to report for duty described in 3, and the incidents described in 4, 5, 6, and 9 as clearly beyond the scope of First Amendment protection.

As to the incidents described in 7 and 8, to use the language of the district judge, they "were capable of interpretation as embodying a [protest] of racial discrimination" [Pet. App. B, p. 36a]. On the merits, petitioner's criticisms have no validity and it is not entirely

clear they related to any matter of public concern under the circumstances. Respondent's objection was not to the *content* of the criticisms, but rather to the fact that they constituted interference in the administration of the attendance center, well outside the scope of petitioner's employment, disruptive, and not conducive to an orderly educational process.

II

ON BALANCE, RESPONDENTS' INTERESTS IN OPERATING AN EFFECTIVE EDUCATIONAL INSTITUTION OUTWEIGH PETITIONER'S INTEREST IN FIRST AMENDMENT PROTECTION.

The circumstances under which petitioner's conduct occurred were difficult and trying. The success or failure of Glen Allan Attendance Center as an effective, viable educational institution was in delicate balance. Success depended totally upon the establishment and maintenance of an orderly process, and the full cooperation of every employee directed towards making the court-imposed integrated system of education function effectively. This should be said in a straightforward language, but it ought not to be necessary to do so.

The relevant testimony of Mr. Leach, the principal, on why he did not recommend renewal of petitioner's contract is summed up in these excerpts:

> "Q. And you agreed that she was a competent teacher? A. I said all along that Mrs. Givhan was a competent teacher, *if that is what she would have done instead of trying to run the school.*"
>
> App., p. 75. (Emphasis added.)

> "Q. All right, sir. Now, based upon your associations with Mrs. Givhan, did you form any opinion as to whether the school could be successfully or unsuccessfully run with her present? A. When I was

deciding on teachers for the following year and to inform the Superintendent, who in turn would inform the Board, I decided that due to her antagonism and the problems I had had with her all year long, it would be impossible for me to carry on a successful school at Glen Allan the following year with her there.

"I had decided that if she were there I couldn't be there and carry out the duties, and I was placed there and I intended to do my job, and I felt like I could not do it with Mrs. Givhan there."

App., p. 82-83.

In his letter to the Superintendent, the principal said:

"Mrs. Givhan is a competent teacher; however, on many occasions she has taken an insulting and hostile attitude towards me and other administrators. She hampers my job greatly by making petty and unreasonable demands.[13] *She is overly critical for a reasonable working relationship to exist between us.* She also refused to give achievement tests to her homeroom students."

App., p. 44. (Emphasis added.)

We think this case falls squarely within the balancing test of *Pickering, supra*, as stated by this Court in this quotation:

"* * * At the same time, it cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with the regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting

[13] E.g., assignment of NYC workers to office work and assignment of a black as the cafeteria ticket-taker.

the efficiency of the public services it performs through its employees."

391 U.S. at 568.

After pointing out that it is neither appropriate nor feasible to lay down a general standard against which teachers' statements may be judged, this Court indicated these guidelines in attempting to strike a balance: (1) Are the statements directed towards any person with whom petitioner would normally be in contact in the course of her daily work? (2) Is there a question of maintaining discipline by immediate superiors or harmony among coworkers? and, (3) Is this the kind of close working relationship for which it can persuasively be claimed that personal loyalty and confidence are necessary for proper functioning?

Applying these guidelines to the case at bar, it cannot be disputed that the failure to renew petitioner's contract was directly based upon her direct working relationship with the principal. In the hirearchy of the school system, the principal reports directly to the superintendent and the classroom teachers report directly to and are under daily supervision of the principal. The latter is responsible for the successful operation of his attendance center, and that, in turn, is directly dependent upon the manner in which the individual teachers perform. In a small school[14] such as Glen Allan, the contact is closer than in a larger institution. The principal is charged with the duty of constant observation and evaluation of performances by each teacher under his supervision. [App., p. 30, 31] The principal, then, is in a much better position to reach a valid conclusion as to a teacher's value to the system, based upon constant, daily contact, than is a trial judge who has limited opportunity

[14] 527 pupils and 27 teachers (including Title I teachers and teacher aides). R., pp. 69, 70.

to form a judgment and then only when that teacher is putting her best foot forward.

The situation is analogous to the story about Leopold Stokowski who, receiving a compliment upon an expensive pair of handmade shoes given him by an admirer, is said to have replied, "Thank you, madam; but only I know where they pinch." Petitioner may be a competent teacher (if that was what she would do), but only her principal knows where she pinches.

As to the question of maintaining discipline or harmony among co-workers,[15] the knife incident [Paragraph 4, Point I] was a direct breach of discipline. Incidents in numbered paragraphs 6 and 9, above, are specific instances where petitioner challenged the principal's authority, and in the former, she entered into a dispute with him in the presence of students. None of these are conducive to discipline, particularly in the tense atmosphere then existing at Glen Allan.

Going to the last guidelines, the question of loyalty and working relationships between petitioner and her immediate superior, we say first that petitioner was utterly lacking in loyalty to the district or to her school. Specifically, she protested assignments of two black teachers to Riverside, done in compliance with a direct order of the District Court; she protested scheduling when the district was abruptly reconstituted under the order of January 21, 1970; there was enough doubt that she (and others) would report for duty in the new con-

[15] Both petitioner and Hodges maintain in their testimony that their differences while teaching together at Glen Allan was not disruptive. It is apparent as Leach testified [App., p. 67] that antagonism did exist between them. Hodges testified that "many times we [petitioner and Hodges] did not see eye-to-eye about things, but it wasn't to the point that we came to blows." [App., p. 97] Petitioner thought Hodges should counsel seventh and eighth grade students and seemed to resent the fact Hodges was hired to counsel less than a hundred students [App., p. 117, 118].

figuration to require a personal letter to her stating that it was a condition of continued employment; she kept a knife for one of her students during a "shakedown" for deadly weapons; at the beginning of the 1970-71 session, she avowed her intention not to cooperate with the school administration and in fact did not do so during that school year; instead of "graceful fulfillment of her assignments" [*supra*, p. 7], she specifically protested administration of a routine six weeks (or, perhaps, semester) test and a standard achievement test required of all classrooms; and she protested assignments of NYC workers to tasks normally performed by such part-time workers, and the assignment of a white to take up tickets in the cafeteria which then had an all black staff.

As to the working relationship with her principal, this "vocal critic", as termed by the trial judge, [Pet. App., p. 36a], and "outspoken" (as she characterizes herself), [App., p. 150], or "too outspoken" (as characterized by her colleague and co-plaintiff), [App., p. 97] classroom teacher had plainly and simply reached the point where a "reasonable working relationship" [App., p. 44] could not exist.

In addition to the above guidelines, we suggest that the nature of the communication and the degree of public concern should be given some weight in balancing petitioner's interests against the public interests. The specific communications here for which First Amendment protection is sought are petitioner's objections to employment of NYC workers in a janitorial capacity, and placement of a white person in the position of taking up cafeteria tickets.

At best, employment of the NYC workers was "make-do" work to help children of low-income families stay in school in grades 9-12, their selection and referral to respondents being

> "* * * based on a comprehensive evaluation of the individual's achievements, aptitudes, and interests, abilities, personal and social adjustments, work experience, health, financial resources, personal traits, and other adequate pertinent data. * * *"
>
> 29 CFR Section 50.10(a)

Had these NYC workers been qualified for office work, proof was available in the office of the referral agency to rebut the principal's statement they were not qualified for the assignments petitioner insisted upon. Absent such proof, the principal's statement must be taken at face value.

We suggest there is little, if any, public interest in affording First Amendment protection to petitioner's contention that NYC workers should be assigned to tasks for which they are not shown to be qualified, purely because of their race.

As to petitioner's criticism of a white person's assignment to the position of ticket-taker at a cafeteria with an otherwise all black staff, we suggest that the principal correctly characterizes this as a "petty and unreasonable demand." [App., p. 44]. The assignment is entirely reasonable, except for petitioner's subjective conclusion that the position was "choice" and therefore should be assigned to a black. [App., p. 116].

Given the facts, we agree with the principal that petitioner's criticisms in these areas are "petty and unreasonable". We suggest there is little, if any, public interest to be served in according First Amendment protection to these complaints.

Cases decided since *Pickering*, applying the balancing-of-interests test, are in accord with respondents' position. For examples:

> *Smith* v. *U.S.*, 502 F.2d 512 (5th Cir., 1974) (Job requirements of a staff psychologist charged with the task of administering psychotherapeutic treatment to emotionally disturbed veterans outweighed his right to wear a "peace pin");
>
> *Phillips* v. *Adult Probation Department, City and County of San Francisco*, 491 F.2d 951 (9th Cir., 1974) (Governmental interests in promoting efficiency of public services in probation department outweighed probation officer's right to display in his office posters favorably depicting persons who were fugitives from justice.);
>
> *Sprague* v. *Fitzpatrick*, 546 F.2d 560 (3rd Cir., 1976) (public declaration by first assistant district attorney to effect that the district attorney had not told the truth respecting a conflict of interest so undermined the necessary working relationship between them as to justify discharge, although assistant's criticisms concerned matters of grave public interest.); and
>
> See: Note, Mich. L.Rev. 365 (1977) (An excellent review of current law)

In summary, there is no evidence or contention whatsoever by petitioner that respondents retaliated against her, or anyone else, directly or indirectly, on account of matters clearly protected by the First Amendment. Putting together her criticisms of NYC worker assignments and of assignment of a white ticket-taker to the local cafeteria, the specific instances where she objected to routine assignments, and her announced intention not to cooperate with the school authorities (which she promptly and continually implemented), we suggest that on the whole petitioner became a liability, rather than an asset, to the school district, that she destroyed any reasonable working relationship between herself and her principal. In this case, public interest in a viable, efficient educational system far out-weighs any interest she may assert claiming First Amendment protetion for these comments.

Under all circumstances, including the difficult conditions under which respondents were struggling to emerge with a sound educational system, we think the decision not to renew petitioner's contract was justified.

III

SINCE THIS WAS A *PRE-DOYLE* CASE WHEN TRIED TO THE DISTRICT COURT, THERE BEING SUBSTANTIAL EVIDENCE IN THE RECORD THAT RESPONDENTS WOULD NOT HAVE RENEWED PETITIONER'S CONTRACT IN ANY EVENT, JUSTICE REQUIRES THAT THE CASE BE REMANDED FOR A SPECIFIC FINDING ON THAT ISSUE, SHOULD THE COURT DECIDE ADVERSELY TO RESPONDENTS' POSITIONS STATED ABOVE.

The trial judge's relevant ruling was:

> "The court is aware of the considerable problems which occurred in this school district during the establishment of a unitary system in the 1969-70-71 period. There were several incidents of student and teacher demonstrations and other unpleasant manifestations of general discontent and unrest among the black community as to the course of desegregation of Western Line School District. Most happily, the passage of time [16] has dissipated the great majority of this friction. However, when the school district's decision to terminate Givhan's employment is placed into a setting contemporaneous with its conception and execution, it becomes clear to the court that the school district's motivation in failing to renew Givhan's contract was *almost* entirely a desire to rid themselves of a vocal critic of the district's policies and practices which were *capable* of interpretation as embodying racial discrimination.

[16] *Since* petitioner's departure from the system. There were no such incidents or "unpleasant manifestations" attributable to the *white* community.

> The court conceives this to be a violation of Givhan's rights under the First Amendment to the Constitution of the United States."

Pet. App. B., p. 35a-36a. (Emphasis added.)

As we understand *Doyle's* rationale, once the plaintiff establishes that exercise of protected rights played a "substantial" part in the respondents' decision not to renew her contract, the burden then shifts to them to show that their decision not to renew would have been reached in any event, without regard to exercise of protected rights.

At the time the District Court entered its ruling, *Perry* v. *Sinderman*, 408 U.S. 593 (1972), had laid down the rule that nonrenewal of a nontenured teacher's one-year contract could not be predicated upon exercise of First or Fourteenth Amendment protected rights. Consequently, it was not necessary for the District Court to consider, and it did not consider the second-step of *Doyle*, whether respondents would have declined to renew respondent's contract for reasons independent of her exercise of First Amendment rights.

In this connection, it becomes important to note what the trial court did and did not hold. Looking at the emphasized portions of the quotation above, it held respondents' motivation of "*almost* entirely" a desire to rid themselves of a vocal critic of district policies and practices "*capable*" of interpretation as embodying racial discrimination.[17] Being "capable of" interpretation as embodying racial discrimination" and *actually* embodying

[17] There is no proof in the record whatsoever, other than petitioner's self-serving statement she was not re-hired "Because I am black" [App., p. 150], that there was any consideration of her race in respondent's decision. Note that at the same time respondents decided not to renew petitioner's contract, they re-employed her husband as assistant principal [App., p. 151]. Petitioner, a black, was replaced with a black [App., p. 83].

racial discrimination are two separate and distinct things. There is *no* finding by the trial court that there *was* any racial discrimination.

In all fairness to respondents, should they be mistaken in the preceding arguments, this case should be remanded to the trial court for a determination of whether respondents would not have renewed petitioner's contract without regard to the alleged exercise of First Amendment rights.

Stewart v. *Bailey*, 561 F.2d 1195 (5th Cir. 1977). The "almost" entirely is another way of stating that the trial court recognizes respondents had other reasons for nonrenewal, and justice should require they be afforded an opportunity to make their case on such reasons, other than exercise of First Amendment rights, if any.

CONCLUSION

We do not believe that the opinion of the Court of Appeals below, to the extent it holds public employees do not have First Amendment rights in communications with their employer, is or should be the law. However, we believe Judge Roney was right in his concurring opinion stating,

> "I concur in the result reached by Judge Gewin in this case. I think that there are probably many occasions when First Amendment constitutional protection will reach private expression by a public employee, but *I agree that the district court erred in casting this case in the First Amendment terms.*" Pet. App. A, 26a. (Emphasis added.)

In none of the incidents identified under Point I of this brief, where First Amendment rights were involved, is there any evidence, indication or suggestion that respondents retaliated, directly or indirectly, against petitioner or any other teacher for exercise of those rights.

No school can function without the cooperation and loyalty (in the sense defined above,) of its teachers, even under the best conditions. Under conditions as they existed when the principal came down to Glen Allan some four or five weeks after it began operations, with mostly new teachers and mostly new students and under strained, unfamiliar conditions, loyalty is more than a desirable quality; it is an absolute must. Petitioner's failure to cooperate, her objection to the methods used by the principal to communicate with the teachers, her objections to giving routine six weeks (or perhaps semester) tests, her objections to giving standard achievement tests, and her constant preoccupation with matters far outside the scope of her employment, taken together, had to and finally did outweigh her utility to the district as a classroom teacher. We think Mr. Leach's conclusion that petitioner was "overly critical for a reasonable working relationship to exist" [App., p. 44] between them is completely justified on the record in this cause, and that public interest in a viable educational institution outweighs petitioner's interest in First Amendment protection, if any.

In short, we think the Court of Appeals reached the right result, but for the wrong reasons. Its opinion should be modified and as modified, affirmed. Failing that, respondents should, as a matter of equity and fair play, be afforded an opportunity to demonstrate to the trial court that petitioner's contract would not have been renewed under any circumstances, entirely independently of an exercise of First Amendment rights.

Respectfully submitted,

/s/ J. Robertshaw
J. ROBERTSHAW
Commercial National Bank Building
Greenville, Mississippi 38701

Attorney for Respondents

Of Counsel:

ROBERTSHAW & MERIDETH
P.O. Drawer 1498
Greenville, Mississippi 38701

CERTIFICATE

I, J. ROBERTSHAW, attorney for respondents, hereby certify that I have this date mailed the foregoing brief to Wilson-Epes Printing Co., Inc., 707 Sixth Street, N.W., Washington, D.C. 20001, in type-written form, via United States express mail, postage prepaid, with instructions to have the same printed, filed with the Court, and served upon counsel for petitioners at the addresses shown below in accordance with the Rules of this Court, and its affidavit of such service filed with this Court:

DAVID RUBIN
1201 Sixteenth Street, N.W.
Washington, D.C. 20036

STEPHEN J. POLLAK
RICHARD M. SHARP
734 Fifteenth Street, N.W.
Washington, D.C. 20005

FRED L. BANKS
318 East Pearl Street
Jackson, Mississippi 39205

DAVID M. RABBAN
One Dupont Circle, N.W.
Washington, D.C. 20036

WILLIAM VAN ALSTYNE
Duke University
School of Law
Durham, North Carolina 27706

WILLIAM A. DOBROVIR
ANDRA N. OAKS
2005 L Street, N.W.
Washington, D.C. 20036

This 27th day of July, 1978.

/s/ J. Robertshaw
J. ROBERTSHAW

APPENDIX A

EXCERPTS FROM ORDER ENTERED AUGUST 22, 1969

* * * *

PLAN FOR SCHOOL OPERATION

SCHOOL YEAR 1969-1970

III. Faculty and Staff Desegregation and Preparation

a) The defendant board shall, within the full extent of its ability to do so, employ and assign faculty and staff members to each school or attendance center in the district so that for the school year 1969-1970, approximately one out of every six full-time faculty and staff members shall be of a race different from the majority of such school faculty and staff.

b) In determining its ability to accomplish faculty and staff desegregation the attention of the school board is directed to the decision of the Fifth Circuit Court of Appeals in the case of *United States of America* v. *Indianola Municipal School District, et al.*, #25655, April 11, 1969, 410 F.2d 626, which shall furnish the guide for the board's action in this regard.

* * * *

PLAN FOR SCHOOL OPERATION

SCHOOL YEAR 1970-1971 AND THEREAFTER

I. Student Assignment

a) All pupils residing in the district attending grades 1 through 3 shall be assigned to the new Avon Primary

Center, regardless of residence, and all teachers in grades 1 through 3 will be assigned to this center. At the primary center, pupils will be taught in small groups in an ungraded situation and advanced at the pupil's individual pace. Pupils advancing at a more rapid pace will be given an enriched education; those advancing at a slower pace will be given specialized attention and the benefits of all available resources to raise their achievement level.

b) Riverside Attendance Center will be re-constituted to accommodate grades 4 through 12 with a curriculum oriented to arts, sciences and advanced technology. O'Bannon and Glen Allan Attendance Centers will be re-constituted to accommodate grades 4 through 12 with curricula oriented to general education, technical and vocational training.

c) All students in each grade will be ranked, top to bottom, on the basis of achievement test scores and grades earned as indicative of performance levels, and on the basis of intelligence test scores as indicative of ability. The optimum capacity of Riverside Attendance Center shall be determined for each grade, 4 through 12, and sufficient top-ranked students in each grade will be assigned for optimum utilization of that center. All other students living north of Mississippi Highway No. 12 will be assigned to O'Bannon Attendance Center, and those living south of that highway will be assigned to Glen Allan Attendance Center.

d) The board shall conduct tests at any time as and when necessary for the proper functioning of its plan for the operation of its school, and such tests shall be retained and preserved by the board and made available to plaintiffs or their counsel, or the Court, upon request.

FOR ARGUMENT

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1051

BESSIE B. GIVHAN,
Petitioner,

v.

WESTERN LINE CONSOLIDATED SCHOOL DISTRICT ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

REPLY BRIEF FOR PETITIONER

DAVID RUBIN
1201 Sixteenth Street, N.W.
Washington, D.C. 20036

STEPHEN J. POLLAK
RICHARD M. SHARP
734 Fifteenth Street, N.W.
Washington, D.C. 20005

FRED L. BANKS
318 East Pearl Street
Jackson, Mississippi 39205

Attorneys for Petitioner

Of Counsel:

SHEA & GARDNER
734 Fifteenth Street, N.W.
Washington, D.C. 20005

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1051

BESSIE B. GIVHAN,
Petitioner,

v.

WESTERN LINE CONSOLIDATED SCHOOL DISTRICT ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

REPLY BRIEF FOR PETITIONER

Respondents appear to have conceded the only issue on which the petition for certiorari was based. They state that "to the extent that the Court of Appeals holds in this case that no private expression by a public employee is protected by the First Amendment, we must in all candor, agree with petitioner and the *Amici Curiae*, that the case is wrong." Res. Br. 3. Respondents also state that they "agree that the opinion of the Court of Appeals is overly broad to the extent it holds all private communications between a public employee and the employer should not receive First Amendment protection . . ." (emphasis

added).[1] Respondents, however, now ask this Court to rule on two other issues—(1) whether Mrs. Givhan's speech was protected under the *Pickering* balancing test, and (2) whether the case should be remanded to the district court for a finding, in light of *Mt. Healthy*, as to whether respondents would have made the decision not to renew Mrs. Givhan's contract in the absence of her protected conduct. See *Pickering* v. *Board of Education*, 391 U.S. 563 (1968); *Mt. Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274 (1977).

We join with respondents in urging this Court to rule on the *Pickering* issue, since (a) respondents' argument is advanced in support of the judgment below; (b) that issue must be decided by some court if the question on which certiorari was granted is decided in petitioner's favor; (c) the facts necessary to decide the *Pickering* issue are before this Court; and (d) a remand would unnecessarily delay the ultimate resolution of this already protracted litigation. This Court should not decide the *Mt. Healthy* remand issue, however, because (a) since that issue already has been decided below, it is not an issue that must be resolved in order to conclude this litigation; and (b) the issue is a simple factual issue presenting no important question of federal law.

Respondents also argue as a separate point in Part I of their brief (pp. 6-13) that "Judge Roney was right in his concurring opinion [that] [t]his case never should have been cast in terms of the First Amendment." Res.

[1] It seems clear that these concessions embrace that part of the court of appeals decision which concludes that "private expression by a public employee is not constitutionally protected." Pet. App. 16a. Respondents also implicitly concede that there are circumstances in which a teacher's private expressions to her principal are protected. Thus, in defending the judgment of the court of appeals under the *Pickering* balancing test, respondents contend that the particular nature, manner and impact of Mrs. Givhan's speech deprived it of constitutional protection (Res. Br. 2, 6)—not that a teacher's private expressions to her principal are per se unprotected by the First Amendment.

Br. 6.[2] As we analyze this latter argument, most of its factual assertions either go to the *Pickering* issue because they purport to support the notion that Mrs. Givhan's sp[illegible]h disrupted the school, or go to the issue of whether the case should be remanded to the trial court for a factual finding under *Mt. Healthy*, as to whether she would have been denied reemployment even in the absence of her protected conduct. Thus, we treat these factual assertions as they relate, respectively, to these issues.[3]

[2] Judge Roney's concurrence consists of two sentences. He does not explain why this case should not be cast in terms of the First Amendment. Pet. App. 26a.

[3] There are ten separately numbered factual assertions in Part I of respondents' brief. Items 7 and 8 concern Mrs. Givhan's communications to her principal and are discussed here in the *Pickering* section (pp. 4-7, *infra*). Items 5, 6 and 9 concern other possible grounds or justifications for terminating Mrs. Givhan's employment. These items are discussed in the *Mt. Healthy* section of this brief (n. 8, *infra*).

Items 1 and 2 concern protests by black faculty members who believed that the school district's desegregation plan was requiring black persons to shoulder more than their share of the burden of desegregation. Res. Br. 7-8. These protests occurred in an earlier school year, and the school district agrees that the protests were entitled to First Amendment protection. Res. Br. 12. There is no evident link between these events and the issues at bar.

In Item 3 the district says (Res. Br. 2-3) that as a result of the above protests, school administrators doubted that the black teachers would report for duty and thus sent letters to them, stating that they must report as a condition of continued employment. The petitioner received such a letter. There is no evidence that she failed to report as instructed, and thus this incident has no evident relationship to the issues at bar.

Item 4 concerns a weapons shakedown incident which occurred in an earlier year, at a different school, under a different principal and did not serve to block Mrs. Givhan's reemployment for 1970-71. Res. Br. 9. This incident was not relied on by respondents when they determined not to renew Mrs. Givhan's employment at the end of the 1971-72 school year. Pet. App. 11a-12a. See n. 6 & p. 11, *infra*.

The events discussed in Item 10 were concededly protected by the First Amendment. Res. Br. 12. These events arose, moreover, after the principal and superintendent decided not to renew Mrs. Givhan's contract and thus have no direct bearing on this case.

I. THE SCHOOL DISTRICT HAS FAILED TO SHOW THAT MRS. GIVHAN'S COMMUNICATIONS INTERFERED WITH THE REGULAR OPERATION OF THE GLEN ALLAN SCHOOL.

In our main brief (pp. 19-21), we urged that there is no evidence credited by the district court that would satisfy the school district's burden of showing that Mrs. Givhan's expressions "either impeded [her] proper performance of [her] daily duties in the classroom or . . . interfered with the regular operation of the schools generally." *Pickering*, *supra*, 391 U.S. at 572-73. See also *Tinker* v. *Des Moines School Dist.*, 393 U.S. 503, 508-09 (1969). In response, the school district urges that (A) Mrs. Givhan's expressions to her principal had "no validity"; (B) "they constituted interference in the administration of the attendance center, well outside the scope of petitioner's employment"; (C) they were "disruptive, and not conducive to an orderly educational process"; and (D) Mrs. Givhan's communications evidenced a lack of loyalty. Res. Br. 12-13, 15-18. We show below that the district's arguments are unavailing.

A. *Validity.* In *Pickering*, this Court made clear that First Amendment protection did not turn on the validity of Pickering's statements in his letter to the editor. Those statements were, in many respects, erroneous; and this Court held that "in a case such as this, absent proof of false statements knowingly or recklessly made by him, a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal. . . ." 391 U.S. at 574. See also *Gieringer* v. *Center School Dist. No. 58*, 477 F.2d 1164, 1167 (8th Cir. 1973).

B. *Scope of Employment.* The district contends that the criticisms were beyond the "scope of Mrs. Givhan's employment." Res. Br. 11, 13. But a public employee's speech need not fit within the scope of his or her employment in order to be protected. Pickering's letter to the

editor regarding school bond issues and athletic expenditures might well have been beyond the scope of his employment as a classroom teacher. This Court did not, however, confine First Amendment protection to speech falling within the scope of the teacher's employment. Rather, it said that the "interests of the teacher, *as a citizen*, in commenting upon matters of public concern" must be balanced against the interest of the district "in promoting the efficiency of the public services it performs. . . ." 391 U.S. at 568 (emphasis added). See also *Madison School District* v. *Wisconsin Employment Relations Commission*, 429 U.S. 167, 175 n. 7 (1976) (teacher had "protected right" to communicate with school board on "matters involving the operation of the schools").

C. *Disruption.* In support of their argument that Mrs. Givhan's communications were disruptive, respondents rely on the principal's testimony that Mrs. Givhan was "trying to run the school," that "her antagonism and the problems I had had with her all year long, . . . [made it] impossible for me to carry on a successful school at Glen Allan the following year with her there," and that "[s]he is overly critical for a reasonable working relationship to exist between us." Res. Br. 13-14.

The principal did not identify the alleged statements and/or conduct that led him to these conclusions. His testimony is relevant to the *Pickering* issue only insofar as these conclusions rested on Mrs. Givhan's otherwise protected speech. Under *Pickering*, the teacher's interest in free speech is balanced against disruptive effects flowing from that speech. Any other alleged shortcomings of the teacher are to be considered, if at all, in determining whether the speech was a "substantial" or "motivating" factor in the nonrenewal decision and whether the school district "would have reached the same decision as to [the teacher's] reemployment even in the absence of the protected conduct." *Mt. Healthy*, *supra*, 429 U.S. at 287.

To the extent that the principal's characterizations were meant to refer to Mrs. Givhan's "demands," however, those characterizations can be accorded no weight in the *Pickering* balance because they were in substance repudiated by the district court's findings. Its findings that the "demands" were neither "constant" nor "unreasonable" (Pet. App. 35a) are inconsistent with the notion that Mrs. Givhan's "demands" constituted an effort to "run the school." Certainly, a teacher's suggestion regarding school policy does not lose its constitutional protection merely because the principal labels it an attempt to "run the school." It is inconceivable that the outcome in *Pickering* would have been different had the school system which employed Pickering branded his letter to the editor an effort to "run the school system."

To the extent that the principal concluded that Mrs. Givhan's "demands" manifested "antagonism," he based his conclusion solely on his assertion that the "demands" were "unreasonable." App. 67. That assertion was expressly rejected by the findings of the district court. Pet. App. 35a. Finally, the district court's finding that Mrs. Givhan's "demands" were neither "constant," "petty," nor "unreasonable" refutes the principal's testimony that Mrs. Givhan was "overly critical" in making her "demands."

D. *Loyalty.* The district also urges that Mrs. Givhan's expressions evidenced a lack of loyalty to the district or to her school. Res. Br. 16. It is unnecessary to determine whether the employment relationships between English teachers at the Glen Allan School and their principal were "the kind of close working relationships" for which it could "persuasively be claimed that personal loyalty and confidence" were "necessary to their proper functioning." *Pickering* v. *Board of Education*, 391 U.S. 563, 570 (1968). There is no evidence that Mrs. Givhan was disloyal, unless criticism is per se disloyal.[4] Certainly, the content of Mrs. Givhan's suggestions do not convey a lack of allegiance to her school or her superiors. She spoke and wrote to the principal about integration of the staff, assignment of cafeteria workers and deployment of black NYC workers. By raising these matters privately with the principal, she chose the mode of expression least likely to embarrass her principal or to stir resentment against him.[5]

E. *Conclusion.* In our view, the *Pickering* issue boils down to whether the principal's testimony sufficed to discharge the school district's burden of showing that Mrs. Givhan's speech interfered with the regular operation of the Glen Allan School. See petitioner's brief, pp. 19-22 & n. 16. Since the testimony that respondents rely on was not credited by the district court in its findings, and since the court repudiated the principal's statements at trial that Mrs. Givhan's "demands" were unreasonable, petty and constant, the *Pickering* balance can only be struck in Mrs. Givhan's favor.

II. THIS COURT SHOULD NOT DISTURB THE COURT OF APPEALS' CONCLUSION THAT REMAND IN LIGHT OF *MT. HEALTHY* WAS UNNECESSARY.

Respondents urge that in the event this Court rejects their *Pickering* argument, it should remand this case to the district court for a factual finding as to whether re-

---

[4] See *Meehan* v. *Macy*, 392 F.2d 822, 834 (D.C. Cir. 1968): "Loyalty to the Government employer cannot be held to compel servility of thought and expression."

[5] The school district also contends that a variety of additional incidents, not involving the protected speech at issue, demonstrate that Mrs. Givhan was disloyal, including four incidents from an earlier school year and her purported refusal to cooperate with the school administration. These incidents are not related in time or substance to the speech which the district court found was protected, and accordingly are not to be considered in the *Pickering* balance. See n. 3, *supra*.

spondents would have refused to renew Mrs. Givhan's contract even in the absence of her protected conduct. As we have indicated, this issue, which is not framed by the petition for certiorari, should not be considered since it has already been decided below and since it is a simple factual issue presenting no important question of federal law. The disposition of this issue by the court of appeals, moreover, was appropriate and thus should not be disturbed.

The court of appeals was confronted with the not uncommon situation in which, after the trial of a case and during its pendency in the court of appeals, this Court hands down a decision requiring that a different legal standard be applied to the facts than the one applied by the trial court. In such a case the appellate court, if it considers the question clear enough not to require a remand, may, in the interest of effective judicial administration, itself undertake to apply the governing legal standard to the facts of record. *Cf. Vaca* v. *Sipes*, 386 U.S. 171, 193 (1967); *Wainwright* v. *Sykes*, 433 U.S. 72, 91 (1977).

The court of appeals concluded that while the trial court "did not make an express finding as to whether the same decision would have been made [in the absence of Mrs. Givhan's protected conduct], on this record [respondents] do not, and seriously cannot, argue that the same decision would have been made without regard to the 'demands.'" Pet. App. 11a. The court of appeals noted that respondents "seem to argue that the preponderance of the evidence shows that the same decision would have been justified, but that is not the same as proving that the same decision would have been made." Pet. App. 11a. In support of its conclusion that respondents could not seriously argue that on this record the same decision would have been made, the court of appeals noted that respondents relied, *inter alia*, on several incidents from the 1969-70 school year, but there was "no evidence that Leach or the Board relied on these incidents or were concerned about them in 1971.[6] Reliance on these incidents becomes even more attenuated when it is noted that Givhan's principal at Riverside and the Board were aware of them yet rehired her for the 1970-71 school year." Pet. App. 11a-12a. Therefore, the court of appeals concluded, respondents had failed to make a successful "same decision anyway" defense. Pet. App. 12a.

This factual conclusion that no serious *Mt. Healthy* issue was presented by the record—reached by the court of appeals acting within its appropriate institutional role—should not be disturbed by this Court, whose basic function is the authoritative and unified exposition of federal law, and which is not "a court for correction of errors in fact finding. . . ." *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U.S. 271, 275 (1949).[7]

Certainly, the court of appeals had before it all the facts necessary to decide the *Mt. Healthy* issue and arrived at a reasonable resolution of that issue. It was in respondents' interest, in resisting petitioner's claims that the nonrenewal decision was based on her race and protected speech, to demonstrate that other factors had motivated their decision. Accordingly, a full record was developed as to the actual reasons for that decision.

---

[6] Nor is there any evidence in the record that Superintendent Morris was concerned by incidents occurring before the 1970-71 academic year. The Superintendent's written statement of reasons for not reemploying Mrs. Givhan for the 1971-72 school year made no reference to events preceding the 1970-71 school year. App. 45.

[7] The *Mt. Healthy* defense urged here involves a dispute over "elemental facts" and not over the "constitutional significance to be attached" to such facts. *Neil* v. *Biggers*, 409 U.S. 188, 193 n. 3 (1972). Thus, there is no warrant for this Court to independently sift and weigh the evidence.

On the basis of the trial court's finding that the decision was based "primarily" on Mrs. Givhan's "demands" and "almost entirely" on the desire to get rid of a vocal critic of the school's employment practices, the court of appeals could fairly conclude that all other factors purportedly relied upon by respondents, taken together, played an insubstantial role in the decision. Beyond that, the court of appeals could appropriately take into account that under *Mt. Healthy* respondents have the burden of proof and that the testimony of their sole witness on these factors—testimony disputed by Mrs. Givhan—had been discredited in significant respects by the district court. *Mt. Healthy*, *supra*, 429 U.S. at 287. See pp. 5-7, *supra*.[8]

---

[8] The principal claims that Mrs. Givhan announced in the first faculty meeting that she would not give a standardized test. App. 70-71. Mrs. Givhan denied making that statement and testified that she had stated that the test should be given by the guidance counselor rather than the classroom teacher. App. 143-46. At the proper time, however, Mrs. Givhan administered the test. *Id.* Her testimony is corroborated by Arcell Jacobs. *Id.* at 159.

At trial, the principal claimed that at the first faculty meeting, Mrs. Givhan "was hostile to me and inferred that she didn't intend to cooperate very much." App. 81. In addition, he asserted that he called her in for a conference, asked for her cooperation and "she said she didn't intend to cooperate," and that "[s]he said she didn't like the Western Line District," its superintendent, or "anything connected with the system." *Id.* None of the principal's contemporaneous memoranda concerning Mrs. Givhan's alleged shortcomings refer either to the alleged "inference" at the faculty meeting or to the alleged conference. Mrs. Givhan, moreover, testified that she could not recall any incident in which she told Leach that she disliked the school district or any of its personnel and that she made no such statements. Mrs. Givhan's testimony further indicates that Leach never called her in for a conference since she answered "no" to the question whether Leach had ever had "counselling sessions" with her. App. 119.

The principal testified that while classes were changing, Mrs. Givhan "walked up to me" and said "'I have your little memorandum'" (*id.* at 82) concerning scheduled tests, characterized by the principal as "six-week's tests" (*id.*) but by Mrs. Givhan as "semester" tests. App. 146-47. The principal stated that this occurred "in front of the students." *Id.* at 82. He did not set forth

As the court of appeals noted, although respondents introduced evidence purporting to show that the nonrenewal decision would have been justified by unprotected conduct occurring during the prior year (1969-70), respondents rehired Mrs. Givhan for 1970-71 even though they were aware of such conduct; they did not rely on such conduct as a basis for their nonrenewal decision; and, indeed, there was no evidence that respondents were even "concerned" about such conduct. Pet. App. 11a-12a.[9] Thus, applying *Mt. Healthy* to the record before it, the court of appeals could properly conclude that on this record respondents had "failed to make a successful 'same decision anyway' defense." Pet. App. 12a.

Insofar as respondents may be understood to suggest that the court of appeals erred in failing to remand to permit respondents to offer further evidence as to whether they would have made the same decision absent Mrs. Givhan's protected conduct, the contention is without merit. Respondents have not alleged, either in the court of appeals or in this Court, the existence of any reasons or justifications for their nonrenewal decision other than those already in the record. To permit the record to be

---

any facts that would indicate that the conversation was conducted in an unprofessional manner. Mrs. Givhan testified that she could not recall using the expression "little memorandum." *Id.* at 117. She also testified that "I did not object to giving the semester test," but had "raised a question of the time" because there was insufficient time remaining in which to prepare and grade a semester test as distinct from a test covering the last six weeks of school work. *Id.* at 146-47.

[9] Although respondents also sought at trial to justify their decision on the theory that Mrs. Givhan had "downgraded" the tests of white students, the trial court found this evidence "insufficient and inconclusive." Pet. App. 34a. The court of appeals concluded that this finding was not clearly erroneous. Pet. App. 6a n. 7. Indeed, there is no evidence of downgrading in the record. The only effort to prove downgrading consisted of defense counsel's questioning of Mrs. Givhan. App. 126-36. She denied such conduct. App. 153.

reopened at this time—seven and one-half years after the nonrenewal decision—would simply encourage the respondents to offer afterthoughts and self-serving speculations and further delay ultimate redress for Mrs. Givhan.

Conclusion

For the reasons set forth in petitioner's briefs, this Court should reverse the judgment of the court of appeals and order that the judgment of the district court be reinstated.

Respectfully submitted,

DAVID RUBIN
1201 Sixteenth Street, N.W.
Washington, D.C. 20036

STEPHEN J. POLLAK
RICHARD M. SHARP
734 Fifteenth Street, N.W.
Washington, D.C. 20005

FRED L. BANKS
318 East Pearl Street
Jackson, Mississippi 39205

Attorneys for Petitioner

Of Counsel:

SHEA & GARDNER
734 Fifteenth Street, N.W.
Washington, D.C. 20005

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1051

BESSIE B. GIVHAN,

Petitioner,

v.

WESTERN LINE CONSOLIDATED SCHOOL DISTRICT ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

SUPPLEMENTAL BRIEF FOR PETITIONER

DAVID RUBIN
1201 Sixteenth Street, N.W.
Washington, D.C. 20036

STEPHEN J. POLLAK
RICHARD M. SHARP
734 Fifteenth Street, N.W.
Washington, D.C. 20005

FRED L. BANKS
318 East Pearl Street
Jackson, Mississippi 39205

Attorneys for Petitioner

Of Counsel:

SHEA & GARDNER
734 Fifteenth Street, N.W.
Washington, D.C. 20005

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1051

BESSIE B. GIVHAN,

Petitioner,

v.

WESTERN LINE CONSOLIDATED SCHOOL DISTRICT ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

SUPPLEMENTAL BRIEF FOR PETITIONER

Petitioner files this supplemental brief for the purpose of identifying and describing three rulings of the Court which bear on (1) its jurisdiction to consider one of the issues raised by respondents, and (2) whether, in any event, this Court should decline to consider that issue as a matter of sound judicial discretion.[1]

Respondents have urged that if the judgment of the court of appeals is not affirmed, then this Court should remand this case to the district court for a factual finding as to whether the school district would have refused to renew Mrs. Givhan's contract even in the absence of

---

[1] On October 30, 1978, petitioner's counsel telephoned respondents' counsel and advised him of the contents of this brief in order to offset the delay involved in printing and then serving the brief by mail. A typewritten draft of this supplemental brief was also served by mail on that date.

her protected conduct. See *Mt. Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274 (1977). In our reply brief we stated that the *Mt. Healthy* remand issue, "which is not framed by the petition for certiorari, should not be considered since it has already been decided below and since it is a simple factual issue presenting no important question of federal law." (Reply Br., p. 8.)

(A) The following two decisions show that this Court lacks jurisdiction to consider the *Mt. Healthy* remand issue. In *Rondeau* v. *Mosinee Paper Corp.*, 422 U.S. 49, 61 n. 11 (1975), the respondent presented an alternative argument to the effect that if the court of appeals' decision were not affirmed, the case should be remanded to the district court for trial of issues relating to petitioner's motive. This Court noted that the point was not raised in the petition or brief in opposition, nor made the subject of a cross petition. The Court concluded that "we will not consider the argument when raised in this manner." It pointed out that the judgment of the court of appeals would have effectively ended the litigation whereas respondent's argument, if accepted, would require altering the judgment "rather than providing an alternative ground for affirming it."[2]

In *FEA* v. *Algonquin*, 426 U.S. 548, 560 n. 11 (1976), the court of appeals had invalidated an entire program for imposing licensing fees on imported petroleum. In this Court respondents urged that the court of appeals' judgment should be affirmed, and, alternatively, that part

[2] In the case at bar the judgment of the court of appeals (Pet. App. C, pp. 41a-42a, 20a & n.19) reversed the judgment of the district court and remanded this case to the district court for a determination whether respondents' decision to terminate Mrs. Givhan satisfied the requirements of the circuit-wide desegregation decree. *Singleton* v. *Jackson Municipal Separate School District*, 419 F.2d 1211 (5th Cir. 1970) (en banc). Respondents' *Mt. Healthy* argument, if adopted, would require a change in the scope of the remand and consequently alteration of the judgment of the court of appeals.

of the plan was inconsistent with the requirement of Article I that import duties be uniform throughout the United States. This Court concluded that respondents' alternative argument would "represent not an affirmance of the judgments below, which effectively invalidated the entire scheme and its implementing regulations, but rather a modification of those judgments." The Court ruled that "since respondents filed no cross-petition for certiorari, they are at this point precluded from seeking such modification" of the judgments below. *Id.*

(B) The following case demonstrates that even where this Court may have jurisdiction to consider an issue raised by a respondent, it "decline[s] to entertain" such an issue where the answer is unclear and the issue is not certworthy. In *United States* v. *Nobles*, 422 U.S. 225, 241 n. 16 (1975), this Court stated that "we do not consider . . . [respondent's] contentions worthy of consideration. Each involves an issue that is committed to the trial court's discretion. In the absence of a strong suggestion of an abuse of that discretion or an indication that the issues are of sufficient general importance to justify the grant of certiorari we decline to entertain them." *Id.*

Respectfully submitted,

DAVID RUBIN
1201 Sixteenth Street, N.W.
Washington, D.C. 20036

STEPHEN J. POLLAK
RICHARD M. SHARP
734 Fifteenth Street, N.W.
Washington, D.C. 20005

FRED L. BANKS
318 East Pearl Street
Jackson, Mississippi 39205

Attorneys for Petitioner

Of Counsel:

SHEA & GARDNER
734 Fifteenth Street, N.W.
Washington, D.C. 20005

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-1051

BESSIE B. GIVHAN,

Petitioner,

v.

WESTERN LINE CONSOLIDATED SCHOOL DISTRICT, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR AMICI CURIAE THE FUND FOR CONSTITUTIONAL GOVERNMENT AND THE GOVERNMENT ACCOUNTABILITY PROJECT, A PROJECT OF THE INSTITUTE FOR POLICY STUDIES

WILLIAM A. DOBROVIR
ANDRA N. OAKES
2005 L Street, N.W.
Washington, D.C. 20036
Attorneys for Amici Curiae

Washington, D.C. • THIEL PRESS • (202) 638-4521

Page

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases:

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-1051

BESSIE B. GIVHAN,

Petitioner,

v.

WESTERN LINE CONSOLIDATED SCHOOL DISTRICT, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR AMICI CURIAE THE FUND FOR CONSTITUTIONAL GOVERNMENT AND THE GOVERNMENT ACCOUNTABILITY PROJECT, A PROJECT OF THE INSTITUTE FOR POLICY STUDIES

INTEREST OF AMICI

The Fund for Constitutional Government is a non-profit public charity dedicated, *inter alia*, to fostering constitutional responsibility in the conduct of elected and appointed officials.

The Government Accountability Project (GAP), a project of the Institute for Policy Studies, is a non-profit public interest group formed in 1975 to help restore and

maintain confidence in the federal system by making public officials accountable for their activities. In pursuit of these goals, GAP works to broaden public understanding of the role of the federal employee in preventing government waste and corruption.

GAP has been especially concerned about civil servants whose careers are destroyed for having spoken out against governmental wrongdoing. Through public education, legislative efforts and selective legal action, GAP works to protect the right of all federal employees to initiate constructive criticism without fear of retaliation, and to provide these men and women with vital support. *See, e.g.*, GAP's publication, *A Whistleblower's Guide to the Federal Bureaucracy* (1977).

Amici's efforts on behalf of federal "whistleblowers" are made in implementation of a belief that a professional and dedicated civil service is essential to an effective democracy. Career civil servants are a vital link between our government and the people it serves. They are a bulwark against those who would corrupt our institutions. Amici believe that to preserve not only the integrity and independence of the federal civil service, but also the responsiveness of the federal bureaucracy to the general public, conscientious individuals who wish in good faith to point out illegal or questionable practices must not be forced to choose between their jobs or silence.

STATEMENT OF THE CASE

Bessie B. Givhan–petitioner in this case–is a black public school teacher. For eight years prior to her dismissal, petitioner taught in respondent school district – a district marked by a turbulent history of racial discrimination. *See, e.g., Singleton v. Jackson Municipal Separate School District*, 419 F.2d 1211 (5th Cir. 1969) (*en banc*), *reversed and remanded sub nom. Carter v. West Feliciana Parish School Board*, 396 U.S. 290 (1970), *on remand*, 425 F.2d 1211 (5th Cir. 1970). In 1971, following the recommendation of petitioner's superior, Principal Leach, the school district refused to renew petitioner's contract for the coming year. 555 F.2d 1309, 1312.[1] At that time the school district was in the throes of court ordered desegregation.

Petitioner's competence as a teacher was never in question and had nothing to do with her dismissal. *Id.* Rather, her employers were distressed by petitioner's complaints, made to Principal Leach, her immediate superior, about school practices she believed unlawful and which she felt were harming the children she taught. *Id.* at 1313-15.

Petitioner complained to the principal about the school administration apparently reserving certain administrative positions for white staff, and about black youths being fenced out of the more desirable school jobs given their white peers. *Id.* at 1313. Petitioner feared that black children would be adversely affected by seeing whites and blacks assigned different roles in the "school environment." *Id.* She asked the principal to correct the problem by assignment of blacks to the "white" slots and better integration of the administrative staff. *Id.* The administration responded by firing her. *Id.* at 1313-15.

The court of appeals stated the issue as whether petitioner "had a First Amendment interest *as a citizen* in making complaints to the principal," *id.* at 1316 (emphasis in text). It held she did not. It held that "no one has a right to press even 'good' ideas on an unwilling recipient." *Id.* at 1319. The court of appeals seemed to

---

[1] The court of appeals' Opinion is reported as Ayres v. Western Line Consolidated School District, 555 F.2d 1309 (5th Cir. 1977).

fear that if petitioner's First Amendment claims were upheld, public employees would be forced to receive an unending barrage of complaints from a dissatisfied citizenry:

> Neither a teacher nor a citizen has a constitutional right to single out a public employee to serve as the audience for his or her privately expressed views, at least in the absence of evidence that the public employee was given that task by law, custom, or school board decision.

555 F.2d at 1319.

Viewing Principal Leach as a "captive audience," *id.* at 1319 n. 16, the court reasoned:

> If we held Givhan's expressions constitutionally protected, we would in effect force school principals to be ombudsmen, for damnable as well as laudable expressions.

Id. at 1319. The court of appeals held, in sum, that because Mrs. Givhan did not seek to "disseminate her views publicly," *id.*, the First Amendment did not protect her from a retaliatory dismissal.

ARGUMENT

A PUBLIC EMPLOYEE'S COMPLAINT TO HER SUPERIORS RESPECTING MATTERS RELATED TO CONDUCT OF THE PUBLIC AGENCY EMPLOYER IS SPEECH PROTECTED BY THE FIRST AMENDMENT

I. The Right to Speak is Protected Within the Employment Context as Well as in the Public Media and in Public Forums

The issue in this case is not, as the court of appeals assumed, whether the First Amendment confers on any citizen the right to force government officials to listen

to private expressions of opinion.[2] The issue here is whether the state may punish its employees, by firing them, for speaking to their superiors about matters arising in the arena of their employment.

Teachers, no less than other public employees, have a First Amendment right to express their views on matters of public importance. This Court has "uniformly rejected," *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968), the theory that "public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable." *Keyishian v. Board of Regents*, 385 U.S. 589, 605-06 (1967), *quoted in Pickering*, 391 U.S. at 568. A state may not impose on public employment a condition that impermissibly burdens free speech. *E.g. Perry v. Sindermann*, 408 U.S. 593 (1972); *cf. Arnett v. Kennedy*, 416 U.S. 134, 162 (1974).

This Court held in *Pickering* that a school teacher's good faith criticisms of the institution he served were presumptively entitled to constitutional protection. Only two years ago, in *City of Madison Joint School District No. 8 v. Wisconsin Employment Relations Commision*, 429 U.S. 167, 175 (1976), Chief Justice Burger, speaking for the Court, reaffirmed (following and citing *Pickering*) that "teachers may not be 'compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public school in which they [illegible]" (citations omitted).

Until today the decisions of this Court that protect the right of public employees to disagree wi[illegible] or criti-

[2] Although Principal Leach probably would ha[illegible]d to hear complaints by a group of parents, whom he could not have fired.

cize their employers have involved statements made in a public forum. *E.g. Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977) (communication to radio station); *City of Madison Joint School District, supra* (speech at a public meeting); *Perry v. Sindermann, supra* (newspaper ad and legislative testimony). There is nothing in the cases, however, which implies that such statements, made not in a public forum but through channels to the employee's superiors, are not equally entitled to constitutional protection. Indeed, the point seems obvious.

> The term ["expression" protected by the First Amendment] would also include communications made in the regular course of agency business, even a conversation between two employees of the agency on some minor matter pending for agency consideration. In other words, if the communication satisfies the other requirements for classification as 'expression,' the fact that it takes place within the employment relation does not take it out of the category of 'expression.' Any other view would, of course, render the First Amendment inapplicable except as to utterances made outside the course of agency business. But there is no reason to draw the line at such a point. Effective functioning of a system of freedom of expression requires, certainly so far as the government employee is concerned, protection made for statements made within the employment relation as well as outside it.

T. Emerson, *The System of Freedom of Expression* 566 (1970); *see id.* at 570-71.

Thus in *Pickering* the Court emphasized not the forum, but the character of the employee's statements as reflecting a good faith "difference of opinion that clearly con-

cern[ed] an issue of general public interest." 391 U.S. at 571. The Court emphasized that the "core value of the Free Speech Clause of the First Amendment" is the right to engage in "free and unhindered debate on matters of public importance." *Id.* at 573. That the "debate" takes place before an audience of one in no way lessens its public importance or its character as protected speech especially where, as here, the statements charged racial discrimination in practices and policies of the school system that directly affect the public. This case squarely raises the issue foreshadowed by the Court in *Madison*—that "[i]t would strain First Amendment concepts extraordinarily to hold that dissident teachers could not communicate [their] views to the very decisionmaking body charged by law with making the choices raised . . . ." 429 U.S. at 176 n. 10; for the court of appeals held here that a teacher can be punished, by loss of her job, for doing precisely that.

II. The Court of Appeals' Decision Ignores Not Only the First Amendment Rights of the Employee But the Clear Best Interests of the Public Agency Employer and of the Public It Serves

First Amendment protection for in-channels employee complaints is compelled by the uniquely vulnerable status of the civil servant as "whistleblower." "The threat of dismissal from public employment is . . . a potent means of inhibiting speech." *Pickering*, 391 U.S. at 574. When a public employee criticizes his agency he is criticizing his employer. Either expressly or by inevitable implication he is criticizing his own superiors. Of necessity he visits discomfort upon them, *cf. Waters v. Peterson*, 495 F.2d 91, 98 (D.C. Cir. 1973). He thus may logically fear dismissal, demotion, transfer or suspension in retaliation for his speech—unless this Court recognizes First Amendment

protection for speech within the employment relationship, as well as for going public.

The court of appeals seems to say that had Mrs. Givhan chosen to air her concerns in a newspaper advertisement, over the radio, or at a public meeting, her conduct would have been protected from dismissal or other retaliation. 555 F.2d at 1318. The court of appeals' theory leaves public employees, who wish to preserve both their jobs and their right to voice concerns about the agencies they serve, no choice but to avoid the internal chain of command and to resort forthwith to the press or the public forum. The anomalous result will be that loyal employees like petitioner will be unable to spare their institutions the public embarrassment that might otherwise have been avoided by working within the system.

The court of appeals thus turns on its head the usual, and usually thought proper, order of complaint presentation. Surely it is better to assure First Amendment protection for public employees' resort to internal channels for complaints or suggestions about public agency policy or practice, rather than to force employees to resort first to a public forum in order to ensure such protection.

Congress has observed that "[a]gency heads who are not aware of potentially serious situations within their own organization obviously cannot take any measure to correct them. . . . [D]isclosures [by whistleblowers] should be made in a manner which ensures that those in affected policy-making positions are held accountable . . . . The first step . . . should be to bring the problem to the attention of those officials most able to resolve it—the policy-makers within the agency. . . . It would be grossly unfair to require that employees take evidence of wrongdoing directly to agency heads without offering protection." As the Congress summed up,

"[s]afe, effective intra-agency communication is the prerequisite of responsible, efficient public service. Dissenting opinions and important information, however unpleasant, must be transmitted to top agency officials." Senate Committee on Governmental Affairs, 95th Cong., 2d Sess., *The Whistleblowers, A Report on Federal Employees Who Disclose Acts of Governmental Waste, Abuse and Corruption* at 3, 10, 11, 48 (Comm. Print 1978) (quoted at length in the appendix to this brief).[3]

Agency heads and their top assistants are often far removed from day-to-day operational problems. They may be oblivious to corruption and favoritism at lower levels. The only way for supervisors to obtain the information necessary to maintain efficiency and root out wrongdoing is to rely on and encourage disclosure by employees who have first hand knowledge of the situation.

Lower courts have recognized the need for protection for such communications.[4] In *Burkett v. United States,*

---

[3]Protection for such communications is similar to the protection given communications to a public official whose duties involve the subject matter of the communication. Bridges v. California, 314 U.S. 252, 277-78 (1941). It is important to note that this case does not involve a *requirement* that teachers "submit complaints about the operation of the schools to their superiors for action thereon prior to bringing the complaints before the public." *Pickering,* 391 U.S. at 572 n. 4, and *see id.* at 583 n. 1 (concurring and dissenting opinion of Mr. Justice White). Ironically, if there were such a requirement here, petitioner complied with it; for she presented her complaint to her superior and not to the public at all. *See also* T. Emerson, *The System of Freedom of Expression* 574-75.

[4]Congress has from time to time enacted express "whistleblower" protection. Section 7 of the National Labor Relations Act, 29 U.S.C. § 157 (1970), protects employees who protest conditions which "modern labor-management treats as too bad to have

[footnote continued]

402 F.2d 1002, 1008 (Ct. Cl. 1968), the Court of Claims noted "the importance of keeping open the channels through which employees can call alleged derelictions or injustices to the attention of their superiors." In *Swaaley v. United States*, 376 F.2d 857, 863 (Ct. Cl. 1967), the Court of Claims held that a federal employee who had drafted a petition to "one above him in the executive bureaucracy," alleging what he in good faith thought was incompetence and wrongdoing on the part of others, was protected by the First Amendment. In *Johnson v. Butler*, 433 F. Supp. 531, 535 (W.D. Va. 1977), the court held "that the right of a teacher to voice concerns about conditions which interfere with the education of her students falls squarely within the protections afforded by the Constitution." And in *Hostrop v. Board of Jr. College District No. 515*, 471 F.2d 488, 493 (7th Cir. 1972), a state college president was discharged after he prepared a memo-

to be tolerated in a humane and civilized society," from firing for highlighting the problem by walking off the job. NLRB v. Washington Aluminum Co., 370 U.S. 9, 18 (1962). Protection for industrial employees who report violations is also provided in the Water Pollution Prevention and Control Act, 33 U.S.C. § 1367 (Supp. V 1975) and the Toxic Substances Control Act, 15 U.S.C. § 2622 (1976). *See also* S. 2707, 95th Cong., 2d Sess. (1978) and S. 2640, 95th Cong., 2d Sess., § 1206(c)(1978) (protecting federal employees against "reprisal for the disclosure . . . of information concerning a violation of any law, rule or regulation. . . ."); and *see* statement of Chairman Campbell of the Civil Service Commission to the Congress in support of civil service reform legislation:

> The protection of whistle-blowers is, in our judgment, essential to the improvement of the public service. Too often in the past such employees have experienced reprisals in the form of transfers to remote locations, demotions, removal of duties and responsibilities, or discharges from the agency. These employees have found agency grievance procedures unavailable or unsatisfactory in protecting their rights.

Hearings before the Committee on Post Office and Civil Service Reform on H.R. 11280, The Civil Service Reform Act of 1978, 95th Cong., 2d Sess. (1978) (not yet published) statement of Alan K. Campbell, March 14, 1978, at 15.

randum which suggested curriculum changes that the Board of Trustees found offensive. In holding that appellant's complaint stated a cause of action under the First and Fourteenth Amendments, the court noted that "[p]laintiff, as a public employee, is entitled to be protected from retaliation for actions which he had every reason to believe were a part of his assigned duties."

Indeed, as lower courts have on occasion recognized, the public employee may have a duty to disclose. The Court of Claims noted in *Swaaley*, 376 F.2d at 865, that "[i]f Swaaley believed it [a statement he heard that implied official corruption] to be true, he not only might have reported it, but was under a duty to do so." The court said in *Downs v. Conway School District*, 328 F. Supp. 338, 348 (D. Ark. 1971), that a public school teacher's failure to complain about safety hazards in school "would be violative of her moral, if not legal duty to protect the health and safety of her students."

The public employee's right and duty to blow the whistle is the same "right and duty" every citizen has to "communicate to the executive officers any information which he has of the commission of an offense against [the criminal] laws." *In re Quarles*, 158 U.S. 532, 535 (1895). The reciprocal duty of the government to protect the informing citizen against retaliation arises not " 'solely from the interest of the party concerned, but from the necessity of the government itself that its service shall be free from the adverse influence of force and fraud practiced on its agents, ...' " *Id.* at 536, *quoting Ex parte Yarbrough*, 110 U.S. 651, 662 (1884). *See also Edwards v. Habib*, 397 F.2d 687, 690 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1016 (1969) (reporting violations of law "is at the core of protected First Amendment speech").

The whistleblower's duty is the duty Congress recognized twenty years ago in the Code of Ethics for Government Service, H.R. Con. Res. 175, 72 Stat. B12 (1958):

> Any Person In Government Service Should:
>
> Put loyalty to the highest moral principles and to country above loyalty to persons, parties or Government department.
>
> UPHOLD The Constitution, laws, and legal regulations of the United States and all governments therein and never be a party to their evasion.
>
> * * *
>
> SEEK to find and employ more efficient and economical ways of getting tasks accomplished.
>
> * * *
>
> EXPOSE corruption wherever discovered.
>
> UPHOLD these principles, ever conscious that public office is a public trust.

CONCLUSION

Here petitioner's loyalty to principle—the constitutional principle of racial equality—as expressed to her own superiors, was rewarded with dismissal. Her conduct of her office as a public trust, her right to voice her concerns about evasion of the Constitution and, indeed, of

the commands of this Court, are protected by the First Amendment. The decision of the court of appeals should be reversed.

Respectfully submitted,

WILLIAM A. DOBROVIR
ANDRA N. OAKES
2005 L Street, N.W.
Washington, D.C. 20036
Attorneys for Amici Curiae,
Fund for Constitutional Government and Government Accountability Project, A Project of the Institute for Policy Studies.

APPENDIX

APPENDIX TO BRIEF OF AMICI CURIAE

Excerpts from Senate Committee on Governmental Affairs, 95th Cong., 2d Sess., *The Whistleblowers, A Report on Federal Employees Who Disclose Acts of Governmental Waste, Abuse and Corruption* (Comm. Print 1978) (footnotes omitted) (emphases in text).

p. iii— The efforts of whistleblowers ultimately redound to the benefit of the administrative agencies and the public. Unfortunately, the reward for a whistleblower's adherence to the highest moral principles is often harassment by the employee's supervisors.

p. v— Many employees who discover governmental abuse in the course of their work do not believe that the problems can be answered by turning their backs. However, the personal risks incurred by a "whistleblower" make it hazardous to speak out.

p. 1— *Employees who have exposed governmental waste and abuse have been fired, transferred, reprimanded, denied promotions, RIFFED, or harassed through the misuse of formal discipline procedures.*

Regardless of the validity of the initial allegations raised, many employees who are identified as whistleblowers have been subjected to formal discipline measures as a consequence of their actions.

The treatment received by most whistleblowers serves not only as a reprisal against a "boat-rocker," but also as a warning to other federal employees not to disclose problems, for they can expect similar treatment if they do.

p. 2— *The lack of effective and safe internal agency procedures for registering and resolving allegations*

of wrongdoing is responsible for the initiation of most whistleblower cases.

The federal employee who discovers something wrong often finds himself without an interested or authorized forum to review the problem. Midlevel supervisors often impede the flow of information to top officials because the allegations, even if the supervisor is not directly involved, reflect poorly on his office or division. Most existing internal communication systems are ineffective because the employees who use them are not adequately protected from reprisals and because the system does not ensure that the initial allegation will be confronted and resolved by agency heads.

Whistleblowing is a question of accountability. Those people in policy-making positions should be made aware of and held accountable for the resolution of all allegations of governmental waste and abuse.

Whistleblowers are not asking that agency heads be relieved of their authority and that all employees participate in all decisions. The issue here is one of communication and accountability.

p. 3– Agency heads who are not aware of potentially serious situations within their own organization obviously cannot take any measures to correct them. However, once informed of a problem, once provided with the existing facts pertaining to an allegation of wrongdoing, the agency head can decide what the appropriate response should be. He or she can, using existing authority, make decisions, resolve the problem and be held accountable for their actions.

It is currently too easy for a serious problem to be excused within the bureaucracy because the "right" people were not aware that it existed.

An employee who calls attention to waste or abuse initiates a sequence of events that often becomes uncontrollable. The problem originally raised by the employee very quickly becomes secondary or even irrelevant as the bureaucracy decides how to handle the person who created the disturbance–the whistleblower.

The bureaucracy's major response to a whistleblower is to ignore the allegations raised and to direct its attention at the employee. Once the focus of attention has been centered on the employee, the bureaucracy possesses everything necessary to deal with the "employee problem."

Most whistleblowers are harassed. The harassment itself, or the employee's effort to combat the harassment, triggers a grievance procedure which usually results in neutralizing the whistleblower by forcing him to concentrate his effort and resources on his own defense. The cost, both in financial and human terms, is staggering.

p. 7– The lack of effective internal agency procedure for registering suggestions and concerns is responsible for the initiation of most whistleblower cases. There is no standard procedure for the transmission of ideas to policy makers from policy implementors. Midlevel supervisors often thwart the employee's efforts to communicate controversial, however truthful, information. The supervisor wishes to avoid department-level scrutiny, since problems in his division reflect poorly on his own performance. As an employee becomes increasingly frustrated, he may go too far in attempting to air his concerns. He crosses this line by going too high in the Department or by turning to the "outside."

p. 8– The problems most frequently encountered in whistleblower cases suggest two major areas that should be addressed by reform. There must be increased internal agency communication and more effectively enforced protection from arbitrary harassment. Hopefully, progress in these directions will lead to a positive change in the attitude of federal employees.

pp. 10-11– The following definition of the whistleblowing duty was developed on the basis of this premise as well as from cases and writings on the subject.

> It is the duty of all federal employees to make known examples of governmental waste, misfeasance, or malfeasance to which they have been exposed during the course of their employment. These disclosures should be made in a manner which ensures that those in affected policy-making positions are held accountable for determining the nature of the problem and bringing about its resolution. Federal employees have the right to fulfill this duty free from harassment or reprisal of any type from their superiors, agency, or the Federal Government.

The responsibility of a federal employee to work toward the elimination of governmental malfeasance, misfeasance, and inefficiency should not be a discretionary one. Every federal employee should be charged with keeping the public's best interest foremost in his or her mind. Efficient public service demands that those involved in policy implementation operate under the duty to point out instances where the Government failed to adequately perform its function. As the Federal Government grows larger and more complex, the opportunities for inefficiency, corruption, mismanagement, abuse of power, and other inappropriate activities become more frequent. When these opportunities are exploited, the public finds itself spending more money for less service. The people in top policy making positions are often too far removed from the programs to be able to spot such cases. The people in the best position to bring examples of these activities to policy makers are the federal employees involved in program implementation. They should be encouraged to fulfill this duty.

The first step in a federal employee's attempt to eliminate governmental waste, misfeasance or malfeasance, should be to bring the problem to the attention of those officials most able to resolve it—the policy-makers within the agency. Agency heads who are made aware of a problem can be held accountable for its resolution. Administrators may choose to ignore an employee's allegations, but they risk the ensuing consequences.

When confronted with allegations of waste, misfeasance, or malfeasance, agency officials should be responsible for actively inquiring to see if, in fact, a problem exists and then deciding on corrective action. Their motivation can come from either the severity of the problem presented, or from the desire to avoid any personal or agency embarrassment should the issue be investigated by another body; the public interest is served either way.

Placing the duty to expose governmental wrongdoing on federal employees presupposes their right to freedom from harassment and reprisal. It would be grossly unfair to require that employees take evidence of agency wrongdoing directly to agency heads without offering protection. Without strict safeguards, no federal employee can reasonably be expected to take such action. In the interests of efficiency and

well-motivated public service, procedural safeguards for whistleblowers must be strictly enforced.

p. 12– The desire to maintain a smooth running operation endangers an employee who does pursue the elimination of waste or inefficiency too aggressively and he is often not rewarded by the agency. In fact, the result of the employee's efforts may ultimately be punishment.

p. 16– The need to provide more effective vertical communication within the executive agencies has been well known for many years. Federal employees responsible for implementing policy have a unique and valuable perspective which should be conveyed to those who formulate policy.

The amount of relevant data and knowledge at a policymaker's disposal is directly proportionate to the effectiveness of communication from the agency's "front line" employees. There can be no question that policymakers with functioning, open lines of communication are better qualified to make decisions.

The internal act of communication itself is a neutral, objective act. It does not imply that the policymaker's authority should be shifted to policy implementors. Furthermore, it does not even suggest that the policy implementor's personal opinion on a policy decision should be considered. Communication merely ensures that all relevant facts are made known to the policymaker. This increased level of knowledge adds to the resources from which to draw in decision making. It also increases the policymaker's accountability for a policy's implementation.

pp. 45-46– An employee's right to petition his or her superior is protected by the First Amendment, even though the petition may contain defamatory

statements of a public official. Such a situation was considered in *Swaaley v. U.S.*, in which an employee's in-house petition contained remarks defaming a superior. The Court, noting that it remained within the Department and was presented through the proper grievance channels, said that ". . . (it) need do no harm."

The "harm" comes to both employee and "defamed" official when the statement is publicly circulated. An Air Force civilian employee was discharged for circulating, without the required clearance, a pamphlet criticizing the use of federal money. The Court, sympathetic to his aims, noted that ". . . he simply sought to call attention . . . to maladministration at the government installation for which he worked. Certainly, employees of the Federal Government are not shut off from discussing the defects of their employer, in proper context and fashion." They continued, however, saying that by publishing the broadside, the ". . . *plaintiff violated the obligation of loyalty each employee owes his employer.* The Federal Government, as employer, is entitled to a like measure of loyalty." (Emphasis added.)

Civil Service employees, particularly whistleblowing employees, have certain duties and responsibilities to their government agency, and to the public at large. It seems unreasonable to protect against disclosures so unfounded or with total disregard for agency grievance procedure. The Federal Civil Service, with an interest in efficient public service, may legitimately require the employee to proceed through proper agency channels before going public. The Supreme Court, in *Arnett v. Kennedy*, said that speech, protected or not, may not be grounds for dismissal except for the efficiency of the service.

The employee, in carrying his or her grievance through the proper agency channels, is pressed with the responsibility to exhaust the administrative remedies in seeking a resolution. Under this doctrine, no employee is entitled to a judicial forum until the prescribed administrative procedures have been completed.

Several difficulties arise in the enforcement of this doctrine. Often the employee is forced to take his or her complaint directly to the superior who is the basis of the complaint itself. If the employee fails to comply with the agency's procedures, he or she may be discharged for insubordination.

The doctrine is subject to numerous exceptions. In cases requiring familiarity with the particular administrative scheme, the courts will often defer to the agency to judge whether the employee fulfilled the procedural requirement. One court justified the requirement by stating that ". . . if he is required to pursue his administrative remedies, the courts might never have to intervene." The agency should be given the opportunity to discover and correct its own errors. The Court was also concerned that ". . . frequent and deliberate flouting of administrative processes could weaken . . ." agency effectiveness by encouraging people to ignore the procedures.

In many cases, at the outset of the hearing process, the employee has been relieved of his or her official duties. The employee has generally retained a lawyer, whether or not the case reaches the courts. While suspended, he has no means of livelihood to support himself and his family or to pay the attorney.

Although 5 U.S.C 5596 stipulates recovery of back pay, rarely if ever have the courts, finding the employee victim of improper administrative action, awarded damages in the form of attorney's fees. Case law concerning attorney's fee awards is rife with disparate judgments from different judicial districts. Generally, the courts have stated that neither they nor the Civil Service Commission have the express authority to award legal fees without such a statutory grant of authority from Congress.

In *Fitzgerald v. U.S. Civil Service Commission,* Fitzgerald contended that statutory authority was granted through the Veteran's Preference Act (VPA), section 14. The VPA provides that World War II veteran preference eligibles are entitled to Civil Service Commission appeal from adverse actions with full procedural rights. The Commission is to submit its findings to the administrative agency. The Act states that the agency shall take the corrective action recommended by the Commission.

The courts, however, have differed in their decisions on veterans' ability to recover. One speculated that legal fees might not be recoverable, while another found recovery only for cases involving procedurally improper separations. A third court stated that veterans were eligible to recover legal fees if they were separated and later reinstated.

In *Fitzgerald,* the court held that attorney's fees were not recoverable under VPA section 14 because the section does not contain the "express waiver of sovereign immunity". The Supreme Court has stated that the United States and its agents are immune to suit unless it consents to be used, which must be unequivocally expressed.

Absent this waiver legal fee awards cannot be granted. The *Fitzgerald* court reluctantly agreed that a denial of legal fees under section 14 ". . . would make a mockery and a sham of the mandate of Congress." The court went further, stating that the waiver of immunity and recovery must come from Congress and not the courts.

p. 48– Whistleblowing could hardly be a major issue if federal employees were able to discharge their duty in accordance with the Code of Ethics for Government Service. All action, Government wide, directed at the resolution of the problem, must encourage federal employees to follow the Code. They can no longer be punished for adherence to the dictates of the Code while acting in compliance with their responsibility of public trust. It can no longer be safer and more career enhancing to turn one's back on illegal and even dangerous abuses in government agencies. Honesty and efficiency must be rewarded within the agencies themselves and not only later by the media's and the public's willingness to portray whistleblowers as martyrs.

Serious efforts to encourage compliance to the Code of Ethics within the bureaucracy demand administrative accountability. Agency policy makers must be made aware of and accountable for those problems that federal employees encounter in the course of their work. Safe, effective intra-agency communication is the prerequisite of responsible, efficient public service. Dissenting opinions and important information, however unpleasant, must be transmitted to top agency officials.

p. 49– Federal employees are currently afraid to bring problems to the attention of their superiors. The existence of this fearful attitude must convince

even the most skeptical that a serious problem does indeed confront this Government. The fear of reprisal is so prevalent throughout the bureaucracy that waste and illegality are too often allowed to go unchecked. The code of silence thwarts top management's ability to effectively manage and actually removes the burden of accountability from their shoulders. Agency heads operate without full knowledge of their own agency's activities. Fear of reprisal renders intra-agency communication a sham, and compromises not only the employee, management, and the Code of Ethics, but also the Constitutional function of congressional oversight itself.

Open Door

The least expensive and most easily implemented method for increasing communication within the executive agencies is the use of the "open door" technique. Under this system, the federal employee is able and encouraged to take concerns, complaints, and suggestions directly to his or her supervisor, branch chief, or agency head. The open door would assist in the speedy resolution of problems by encouraging discussion at all levels of bureaucratic administration. It would also open direct lines of communication between policy makers and policy implementors. The open door, if effectively used, would ensure that policy makers became aware of the practical implications of their decisions.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1051

BESSIE B. GIVHAN, *Appellant,*

v.

WESTERN LINE CONSOLIDATED SCHOOL DISTRICT, *et al.,*
Appellees.

On Appeal From the United States Court of Appeals For the Fifth Circuit

BRIEF AMICUS CURIAE OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS

DAVID M. RABBAN
One Dupont Circle, N.W.
Suite 500
Washington, D.C. 20036

WILLIAM VAN ALSTYNE
Duke University
School of Law
Durham, North Carolina 27706

Attorneys for Amicus Curiae

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1051

BESSIE B. GIVHAN, *Appellant,*

v.

WESTERN LINE CONSOLIDATED SCHOOL DISTRICT, *et al.,*
Appellees.

On Appeal From the United States Court of Appeals
For the Fifth Circuit

BRIEF AMICUS CURIAE OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS

INTEREST OF THE AMICUS CURIAE

The decision of the Fifth Circuit panel, by removing *all* internal communication by public employees to administrators from the scope of the First Amendment, has special significance in institutions of higher learning. In such institutions, faculty members have a professional obligation to participate in governance, particularly in the formulation of educational policy. Thus, the *Statement on Government of Colleges and Universities,* jointly formulated by the American Association of University Professors, the American

Council on Education, and the Association of Governing Boards of Universities and Colleges, provides:

> The faculty has primary responsibility for such fundamental areas as curriculum, subject matter and methods of instruction, research, faculty status, and those aspects of student life which relate to the educational process. On these matters the power of review or final decision lodged in the governing board or delegated by it to the president should be exercised adversely only in exceptional circumstances, and for reasons communicated to the faculty. It is desirable that the faculty should, following such communication, have opportunity for further consideration and further transmittal of its views to the president or board. Budgets, manpower limitations, the time element, and the policies of other groups, bodies and agencies having jurisdiction over the institution may set limits to realization of faculty advice. *Statement on Government of Colleges and Universities,* reprinted in AAUP POLICY DOCUMENTS AND REPORTS 40, 43 (1977).

This *Statement* further provides:

> Among the means of communications among the faculty, administration, and governing board now in use are: (1) circulation of memoranda and reports by board committees, the administration, and faculty committees, (2) joint *ad hoc* committees, (3) standing liaison committees, (4) membership of faculty members on administrative bodies, and (5) membership of faculty members on governing boards. Whatever the channels of communication, they should be clearly understood and observed. *Id.* at 44.

If affirmed, the holding of the Fifth Circuit panel would have a devastating impact on academic freedom and the proper operation of our colleges and universities.

The American Association of University Professors (AAUP) was founded in 1915 to advance the standards, ideals and welfare of teachers and research scholars in colleges and universities. Since its inception the Association has formulated Statements, frequently in concert with other national organizations, intended to establish minimum standards of institutional practice in higher education. Paramount among these is the 1940 *Statement of Principles on Academic Freedom and Tenure* (1940 *Statement*), drafted jointly with the Association of American Colleges and currently endorsed by over 100 educational organizations and learned societies. To a large extent, Association standards are recognized and relied on by faculties, administrations, and governing boards in institutions of higher education.

The Association has been deeply concerned with the constitutional protections afforded teachers and research scholars in American higher education. It has therefore participated as *amicus curiae* in cases which raise these issues. In recent years, the Association has filed briefs in this Court in *City of Madison* v. *Wisconsin Employment Relations Commission,* 429 U.S. 167 (1976); *Perry* v. *Sindermann,* 408 U.S. 593 (1972); *Board of Regents* v. *Roth,* 408 U.S. 564 (1972); *Keyishian* v. *Board of Regents,* 385 U.S. 589 (1967); and *Whitehill* v. *Elkins,* 389 U.S. 54 (1967).

The decision below implicates the First Amendment rights of all teachers and research scholars. Accordingly, as an organization deeply committed to the protection of academic freedom and civil liberties at col-

leges and universities, and broadly experienced in the special context of the campus setting, the Association believes it is uniquely situated to address this court as *amicus curiae* in the present litigation.

QUESTION PRESENTED

Does a teacher forfeit the protection of the First Amendment by expressing herself on school matters of public concern through a direct communication to her principal rather than in a public forum?

STATEMENT OF THE CASE

Appellant was a nontenured junior high school teacher whose contract was not renewed by appellee school district even though her principal acknowledged that she was a "competent teacher." Petition for Certiorari at 4a. Both the Fifth Circuit panel and the district court found that appellee's decision against reappointment was "motivated primarily" by the fact that appellant submitted to her principal a list of issues which the principal termed "demands," but which appellant and the Fifth Circuit panel characterized as requests. The panel pointed out that *all* these issues related to appellant's "concern as to the impressions on black students of the respective roles of whites and blacks in the school environment" and therefore concluded that they were "neither 'petty' nor 'unreasonable.'" *Id.* at 8a-9a. The panel also confirmed the district court's finding that

> the school district's motivation in failing to renew [appellant's] contract was almost entirely a desire to rid themselves of a vocal critic of the district's policies and practices which were capable of interpretation as embodying racial discrimination. *Id.* at 9a.

The district court concluded from this finding that the school district had violated appellant's First Amendment rights. The Fifth Circuit panel, however, denied appellant's communications *any* First Amendment protection. The panel acknowledged throughout its opinion that appellant's communications would have been protected by the First Amendment if she had expressed herself in a public forum. It stressed, however, that appellant, instead of bringing her admittedly "laudable" criticisms to "public attention," had "privately voiced" them "to her immediate superior." *Id.* at 13a, 19a. The panel concluded, without any qualifications whatsoever, that appellant's communications were outside the scope of the First Amendment because she chose to submit her grievances regarding the operation of her school directly to her principal.

SUMMARY OF ARGUMENT

The Fifth Circuit panel held that communication by a public school teacher which is otherwise protected by the First Amendment necessarily loses that protection when it is expressed directly to her principal rather than in a public forum. This erroneous holding is based on the panel's fundamental failure to distinguish legitimate intramural communication clearly within the scope of the First Amendment from expressions of merely private concerns wholly extraneous to the business of the agency. The Free Speech Clause protects the conscientious teacher who expresses her views on the operation of her school to appropriate parties within the system instead of, or before, using a public forum. The Petition Clause of the First

Amendment is an additional guarantee of free expression and grants appellant's communications to her principal *greater* constitutional protection than the Free Speech Clause standing alone.

ARGUMENT

I. Good Faith Statements by a Public Employee, Communicating Her Concerns Respecting the Proper Operation of a Public Agency Directly to the Executive Personnel of That Agency, Rather Than Externally to the Public at Large, Are Plainly Not Excluded from the Free Speech Clause.

This case is utterly anomalous. Both lower federal courts found that appellant's criticisms of the policies and practices of the school district by which she was employed "were neither petty nor unreasonable, insomuch as all the complaints in question involved employment policies and practices at Glen Allan School which appellant conceived to be racially discriminatory in purpose or effect." Petition for Certiorari at 9a. Both courts, moreover, found that *"the primary reason"* for the school district's failure to renew appellant's contract was the mere submission of this criticism to appropriate parties within the system itself (emphasis added). *Id.* at 8a. *Compare Mount Healthy City School District Board of Education* v. *Doyle,* 429 U.S. 274 (1977). Despite the admitted relevance of the subject of appellant's communications to the lawful and proper operation of the school in which she taught, the Fifth Circuit panel nonetheless denied these communications *any* First Amendment protection.

The basis for this remarkable conclusion is found in the panel's error of confusing good faith communication of inquiry respecting the manner in which the agency is fulfilling its public responsibilities in lawful and proper ways, with communication of matters which may be so extraneous to the business of that agency or so trivial (*e.g.*, of such a merely gossipy nature) that they relate essentially to private concerns plainly inappropriate to pursue within the agency itself. By treating the first kind of communication as though it were wholly indistinguishable from the gratuitous nature of the second kind of communication, the Fifth Circuit panel condemned *both* as entirely beyond the concern of the First Amendment. The Fifth Circuit panel fully failed to recognize the obvious distinction. Rather, without qualification of any kind, it observed that "private [sic] expression by a public employee is not constitutionally protected." Petition for Certiorari at 16a. The court went forward to characterize appellant's expressions as "laudable," *id.* at 19a, but nonetheless *wholly* unsheltered by the First Amendment *solely* because they were "*privately* voiced . . . to her immediate supervisors" rather than carried outside, "to public attention" (emphasis added). *Id.* at 13a.

By excluding "private" communication from the categories of expression encompassed by the First Amendment, the holding of the Fifth Circuit panel punishes the public employee who, for any of a number of legitimate reasons, decides to express himself to colleagues or superiors through internal channels instead of, or before, using a public forum. Such reasons may include (but are certainly not limited to) considerations of prudence, fairness, loyalty, or poten-

tial effectiveness. A decision to speak in "private," through internal channels, may be in the best interests of the employee, his colleagues and supervisors, and the public. By affording no constitutional protection whatsoever to internal speech by government employees, the panel's holding subjects them all to unreviewable retaliatory dismissals for such speech, no matter how "laudable" the employee's reasons for choosing not to express his views in public. *Id.* at 19a. Thus, a public employee, who on prudential grounds would prefer to use internal means of communication, is forced to choose between self-censorship, which is inhibiting, and public disclosure, which may be unnecessary and unwise.

Throughout its opinion, the court assumed that appellant's communication—criticism of school policies and practices which, in her view, constituted racial discrimination—would have been protected by the First Amendment had she but presumed to carry them into a public forum, rather than to her immediate supervisor. In that case, the court indicated that it would have ordered remedial action, consistent with this Court's decision in *Pickering* v. *Board of Education,* 391 U.S. 563 (1968) and *Mount Healthy City School District Board of Education* v. *Doyle,* 429 U.S. 274 (1977), because the school district's decision not to renew appellant's appointment would have been motivated "almost entirely" by "a desire to rid themselves of a vocal critic." Petition for Certiorari at 9a. According to the Fifth Circuit panel, however, appellant forfeited the First Amendment protection her criticisms would have had only because she chose to communicate them directly to her principal, through an internal communication, rather than via a public

forum such as a letter to a newspaper or a telephone call to a radio talk show. *Id.* at 13a-14a. *Compare Mount Healthy City School District Board of Education* v. *Doyle,* 429 U.S. 274, 282 (1977).

According to this novel theory, *all* internal communication is outside the scope of the First Amendment; *no* expression by a government employee to a colleague or supervisor receives *any* First Amendment protection unless it also reaches the public. Thus, failure to reappoint even an outstanding probationary teacher solely on the basis of a direct communication to her principal can *never* be redressed, regardless of its importance, its relevance to the professional responsibilities of the teacher and of the principal, the reasonableness of the time, place, and manner of expression, or the lack of evidence respecting any impairment of the immediate work relationship. This holding conflicts with the clear precedents of this and other courts and elevates bad policy to the level of constitutional error.

This Court has stressed the importance of affording teachers the right to "comment on matters of public interest in connection with the operation of the public schools in which they work." *Pickering* v. *Board of Education,* 391 U.S. 563, 568 (1968). Because "[t]eachers are, as a class, the members of a community most likely to have informed and definite opinions" regarding school matters of public importance, "it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal." *Id.* at 572. And communication between teachers and school officials "as to the preferable manner of operating the school system . . . clearly concerns an issue of general public interest." *Id.* at 571. There

is, moreover, no suggesting in *Pickering* that this essential First Amendment freedom of teachers to express themselves on matters involving the operation of the schools is in any way dependent on whether this expression occurs in public or through internal channels. *Pickering* focused on the protected subject matter of speech, not on "where the speech happened to occur." *Pilkington* v. *Bevilacqua,* 439 F. Supp. 465, 476 (D.R.I. 1977). It emphasized the *content* rather than the *forum* of expression. *City of Madison* v. *Wisconsin Employment Relations Commission,* 429 U.S. 167 (1976), similarly stressed the independent importance of the protected First Amendment right of teachers to communicate *directly* with their school board regarding the operation of the schools. This Court was especially concerned that "restraining teachers' expressions to their school board (and, by implication, to other school officials) on matters involving the operation of the schools would seriously impair the board's ability to govern the district," *id.* at 177, as well as infringe the "protected right" of teachers "to communicate with the board." *Id.* at 175 n.7.

The decision by the Fifth Circuit panel also flies in the face of this Court's careful encouragement in *Pickering* itself that the intramural communication of professionally-related concern is to be preferred. Thus, this Court observed in a footnote the possibility that in certain limited circumstances "teachers can be required by narrowly drawn grievance procedures to submit complaints about the operation of the school to their superiors for action thereon prior to bringing the complaints before the public. 391 U.S. at 572 n.4. If, therefore, a public employee thinks he *ought* to

express his criticisms directly to his superiors even when not compelled to do so by local regulation, it would make no sense to discourage this preferred course of action by orphaning it under the First Amendment. One should not be punished for being more prudent than the Constitution requires. Indeed, to enact a rule requiring internal communication of professionally-related grievances prior to their public dissemination, and then to sustain nonrenewal of the employee's contract solely because of dissatisfaction with that "private" communication, is to imagine that the First Amendment can be nullified by some preposterous "Catch 22." Premature complaint to the public may furnish just cause for nonrenewal, and mere "private" communication within the system is without protection under the First Amendment? The logical outcome of the lower court's false dichotomy between "public" and "private" speech, when combined with this Court's footnoted suggestion in *Pickering,* is the complete nullification of virtually every decision this Court has addressed to the general subject. The result is frankly remarkable. It is also plainly erroneous.

A substantial number of other lower federal courts have confronted the same issue and none is in agreement with the Fifth Circuit panel. The reasoning of these lower court cases, and the facts on which they are based, provide convincing support for the principle that the protection of the First Amendment is not lost by the more conscientious public employee who voluntarily adheres to the policy which this Court itself encouraged in *Pickering.*

The Fourth Circuit, for example, ordered the reinstatement of a fireman who had been dismissed for

circulating among other firemen and presenting to the fire chief and the city manager a petition protesting the promotion of a black fireman over several whites with greater seniority. The Fourth Circuit found that the fireman "was discharged for exercising a well established and well known constitutional right." *Jannetta* v. *Cole,* 493 F.2d 1334, 1338 (4th Cir. 1974). The Seventh Circuit held that a college president "was deprived of his first amendment right to free expression" when his contract was summarily terminated for circulating among his colleagues his own confidential memorandum discussing proposed changes in the college's ethnic studies program. *Hostrop* v. *Board of Junior College District No. 515,* 471 F.2d 488, 495 (7th Cir. 1972). The Tenth Circuit held that a College violated the First Amendment rights of a faculty member by dismissing him for statements made primarily in his capacity as president or member of the executive committee of the faculty association. The court applied the *Pickering* analysis even though it recognized that these statements "were not made to the public as in *Pickering,* but were made at meetings at which only Dixie College administrators and faculty were present." *Smith* v. *Losee,* 485 F.2d 334, 338 (10th Cir. 1973). And the District of Columbia Circuit, in ordering a remand of a district court decision which had sustained the dismissal of a teacher for sending to four administrative superiors a memorandum and personal statement critical of her principal's management of her school, held that the constitutionality of these communications must be determined by applying the principles set forth in *Pickering. Ring* v. *Schlesinger,* 502 F.2d 479 (D.C. Cir. 1974).

Recent district court decisions, many of which also rely on *Pickering,* further underline that the First Amendment extends to internal communications by public employees. Thus a school district cannot, consistent with the First Amendment, discharge a teacher for bringing a health hazard directly to the attention of her principal in a "private" conversation. *Downs* v. *Conway School District,* 328 F. Supp. 338 (E.D. Ark. 1971). A state department of mental health violated the First Amendment by summarily discharging the administrator of an inpatient mental health unit for criticizing the priorities of his employer in "prudent" and "private" communications to his coemployees and superiors. *Pilkington* v. *Bevilacqua,* 439 F. Supp. 465 (D.R.I. 1977). "There is no doubt" that a college is prohibited by the First Amendment from dismissing a professor for commenting "in two brief conversations with fellow faculty members" on a report critical of his behavior. *Phillips* v. *Puryear,* 403 F. Supp. 80, 88 (W.D. Va. 1975). And a teacher is "protected by the First Amendment in complaining to her principal" that being denied a permanent room assignment "contributed to classroom inefficiency and was adversely affecting her as a teacher." *Johnson* v. *Butler,* 433 F. Supp. 531, 535 (W.D. Va. 1977). *See also Los Angeles Teachers Union* v. *Los Angeles City Board of Education,* 455 P.2d 827 (Cal. 1969) (teachers have a First Amendment right to circulate among colleagues petition addressed to various school and public officials regarding appropriations for higher education).

These decisions emphasize that the protection of the First Amendment is not restricted to expression in a public forum. Cases protecting internal speech by

teachers within their school system, moreover, cite the same First Amendment values emphasized by this Court in *Pickering, City of Madison,* and numerous prior decisions. Teachers must be able "to express their views on school policies and governmental actions relating to schools," *Los Angeles Teachers Union* v. *Los Angeles City Board of Education,* 455 P.2d at 836, and "the right of a teacher to voice concerns about conditions which interfere with the education of her students falls squarely within the protection afforded by the Constitution." *Johnson* v. *Butler,* 433 F. Supp. at 535. The right to free expression on these subjects is not dependent on whether the expression takes place in a public forum. A public employee "can not be deprived of constitutional protection because he voiced from within matters that were entirely appropriate for public discussion and of current public interest." *Pilkington* v. *Bevilacqua,* 439 F. Supp. at 475. By ignoring this reasoning, the Fifth Circuit panel removed constitutional protection from an essential category of communication. The fact that *none* of the public employees in *any* of these lower court cases would have prevailed in the Fifth Circuit suggests the potential consequences of accepting the panel's conception of the First Amendment.

Respectfully, whatever the inadvertence that misled the Fifth Circuit panel to its erroneous conclusions that no intramural communication of professionally-related concerns of public employees is within the protection of the First Amendment, the decision below must be reversed.

II. The First Amendment Right To Petition Provides Specific Additional Protection for Internal Expression by Government Employees.

The specific provision in the First Amendment guaranteeing the right "to petition the Government for a redress of grievances" provides additional authority that the constitutional protection for communication between a public employee and her supervisor does not depend on whether that communication reaches a public forum. This provision, Justice Story wrote, "was probably borrowed from the declaration of rights in England, on the revolution of 1688, in which the right to petition the king for a redress of grievances was insisted on; and the right to petition parliament in like manner has been provided for, and guarded by statutes passed before, as well as since that period." J. Story, *Commentaries on the Constitution,* Book III, § 1888, at 745 (1833). Infringement of the right to petition the king for a redress of grievances was one of eight conditions which American lawyers in the colonial period "regarded as violations of immemorial rights or liberties secured by the law of the land." R. Pound, *The Development of Constitutional Guarantees of Liberty* 71-72 (1957).

The scope of protection afforded the right to petition for a redress of grievances has always been broad, and, like "cognate" First Amendment "rights to freedom in speech and press," *Thomas* v. *Collins,* 323 U.S. 516, 530 (1944), has expanded over time. *See* Note, *Dismissals of Public Employees for Petitioning Congress: Administrative Discipline and 5*

U.S.C. Section 652 (d), 74 YALE L.J. 1156, 1164 n.44 (1965). According to Justice Story:

> The statements made in petitions addressed to the proper authority, in a matter within its jurisdiction, are so far privileged that the petitioner is not liable, either civilly or criminally, for making them, though they prove to be untrue and injurious, unless he has made them maliciously. J. Story, *Commentaries on the Constitution,* Vol. II, § 1895, at 645 n.b (5th ed. 1891).

Similarly, Professor Cooley characterized the right to petition as a "generic term" which "applies to all recommendations to office or public position or privilege, as well as to remonstrances against them, and to appeals of every sort, and for every purpose, made to the judgment, discretion, or favor of the person or body having authority in the premises." T. Cooley, *The General Principles of Constitutional Law in the United States of America* 297 (1898).

Consistent with these interpretations, this Court has held that the "grievances for redress of which the right of petition was insured, and with it the right of assembly, are not solely religious or political ones. And the rights of free speech and a free press are not confined to any field of human interest." *Thomas* v. *Collins,* 323 U.S. at 531. The right to petition, moreover, "extends to all departments of the Government," including "administrative agencies." *California Motor Transport Co.* v. *Trucking Unlimited,* 404 U.S. 508, 510 (1971).

The First Amendment "right to petition Government for a redress of grievances," as a number of courts have pointed out, affords constitutional protection to government employees who communicate their grievances directly to those in the administrative

hierarchy having authority to deal with them. Thus, for example, the Court of Claims, relying explicitly on the Petition Clause, has held that "a petition by a federal employee to one above him in the executive hierarchy is covered by the First Amendment." *Swaaley* v. *United States,* 376 F.2d 857, 863 (Ct. Cl. 1967). Accordingly, the Court of Claims held in a subsequent decision that a probationary teacher's letter to a member of the Office of Economic Opportunity complaining about racial discrimination in school employment practices was an exercise of his "First Amendment right to petition for redress of grievances" and could not provide a permissible basis for his discharge. *Jackson* v. *United States,* 428 F.2d 844, 848 (Ct. Cl. 1970). Similarly, the Supreme Court of California, in sustaining the right of teachers to circulate among colleagues a petition addressed to various school and public officials, held that "[w]here, as here, government is the desired audience, the First Amendment provides a specific constitutionally protected means for communicating effectively, the petition for redress of grievances." *Los Angeles Teachers Union* v. *Los Angeles City Board of Education,* 455 P.2d at 832. Although not specifically referring to the right to "petition," this Court in *City of Madison* invoked its values in finding that the school board's order violated the First Amendment by constituting an "effective prohibition" on teachers "from communicating with their government." 429 U.S. at 176. *See also Jannetta* v. *Cole,* 493 F.2d 1334, 1337 n.5 (4th Cir. 1974) (public employee has First Amendment right "to communicate a grievance to his superiors").

The historical development of the right to petition suggests that it applies with particular force to *direct* communications with government that do not take place in a public forum. Professor Chafee points out that both in England and America through the end of the eighteenth century, the "people could not make adverse criticism [of government] in newspapers or pamphlets, but only through their lawful representatives in the legislature, who might be petitioned in an orderly manner." Z. Chafee *Free Speech in the United States* 19 (1941). Thus, the right to petition could coexist with the law of seditious libel, which prohibited the intentional publication of criticism of public figures, laws, and institutions. *Id.* Laws punishing "seditious libel" are now, of course, prohibited by the First Amendment, *New York Times* v. *Sullivan,* 376 U.S. 254 (1964), and courts have extended the right to petition to include expression in a public forum. *Edwards* v. *South Carolina,* 372 U.S. 229 (1963). Yet this extension has not vitiated the traditional protection the right to petition affords direct communication with government. In a significant decision, this Court held that a union leader, in writing a telegram to the Secretary of Labor threatening a strike if a judicial decree were enforced, "was exercising the right of petition . . . protected by the First Amendment." *Bridges* v. *California,* 314 U.S. 252, 277 (1941). The fact that this telegram was also published in the newspapers while litigation was still pending did not affect this Court's reasoning. *Id.* Justice Frankfurter's dissenting opinion, however, indicates the lingering strength of the view that the right to petition applies particularly to direct communication with government. According to Justice Frankfurter, even though the

right to petition may have protected the sending of the telegram to the Secretary of Labor, it did not also protect the intentional publication during litigation of the telegram in the newspapers. *Id.* at 302-03. More recently this Court, in rejecting the argument of prison inmates that "restricting their access to press representatives unconstitutionally burdens their first and fourteenth amendment rights to petition the government for the redress of grievances," not only pointed out that alternative means of communication with the press "satisfies whatever right the inmates may have to petition the government through the press," but also noted that the inmates had "substantial opportunities to petition the executive, legislative, and judicial branches of government *directly*" (emphasis added). *Pell* v. *Procunier,* 417 U.S. 817, 828-29 n.6 (1973). Thus the Fifth Circuit panel, by denying protection to communications by a school teacher to her principal because they were not made in a public forum, turns the Petition Clause of the First Amendment on its head.

This Court has held that the First Amendment right to petition protects a wide range of expression, including lobbying, *California Motor Transport Co.* v. *Trucking Unlimited,* 404 U.S. 508 (1971); *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.,* 365 U.S. 127 (1961); solicitation of union members, *Thomas* v. *Collins,* 323 U.S. 516 (1944); access to legal counsel, *United Mine Workers of America, District 12* v. *Illinois State Bar Association,* 389 U.S. 217 (1967); *Railroad Trainmen* v. *Virginia State Bar,* 377 U.S. 1 (1964); *NAACP* v. *Button,* 371 U.S. 415 (1963); public demonstrations, *Edwards* v. *South Carolina,* 372 U.S. 229 (1963); and

grievances by prison inmates, *Cruz* v. *Beto,* 405 U.S. 319 (1972). The prior decisions of this and other courts, as well as the historical context in which this right arose, demonstrate that it also provides an additional (and not simply an alternative) guarantee of a teacher's freedom to communicate directly to her principal, through internal channels, about matters involving the operation of the schools. Where the right to petition is applicable, the communication of a government employee receives *greater* constitutional protection than if it were protected by the Free Speech Clause alone. The limitations on speech set forth in *Pickering* v. *Board of Education,* 391 U.S. 563 (1968), for example, might be inappropriate if the expression is covered by the Petition Clause.

III. The Concept of a "Captive Audience" Does Not Justify the Exclusion of Internal Expression by Public Employees from Constitutional Protection.

The Fifth Circuit panel, in addition to misconstruing and misapplying the decisions of this Court dealing with the constitutional protection afforded expression by government employees, justified its holding that "private speech by a public employee is not constitutionally protected" through a misplaced reliance on the concept of a "captive audience." After asserting that "no one has a right to press even 'good' ideas on an unwilling recipient," Petition for Certiorari at 18a, the panel concluded that

> [n]either a teacher nor a citizen has a constitutional right to single out a public employee to serve as the audience for his or her privately expressed views, at least in the absence of evidence that the public employee was given that task by law, custom, or school board decision. *Id.* at 19a.

It is true that this Court, in a variety of contexts, has balanced "the First Amendment rights of speakers against the privacy rights of those who may be unwilling viewers or auditors," *Erznoznik* v. *City of Jacksonville,* 422 U.S. 205, 208 (1975). And in balancing these two independent constitutional rights, this Court, in certain strictly limited contexts, has held that the right of privacy must prevail over freedom of expression. Thus, for example, this Court has allowed a person who receives in his home a "pandering advertisement" which he considers "erotically arousing or sexually provocative" to instruct the sender through the Postmaster that similar material must not be sent to his address in the future. *Rowan* v. *United States Post Office Department,* 397 U.S. 728 (1970). *See also Lehman* v. *City of Shaker Heights,* 418 U.S. 298 (1974) (the degree of captivity of passenger justifies the prohibition of political advertisements on city buses). According to the Fifth Circuit panel, a school principal, "in the normal course of his job," may be subject to even a greater "degree of captivity" than a person in his home or on a bus. Petition for Certiorari at 19a n.16.

The Fifth Circuit panel's comparison of communications between a school teacher and her principal to the facts in *Erznoznik* and *Lehman* reflects a fundamental misconception of the role of administrators in the public schools. The panel takes the curious view that a school principal, "in the normal course of his job," has a privacy interest which must be protected from "invasion" by comments from teachers in his school regarding issues of public importance, including teachers' professional opinions on matters within the principal's responsibilities involving the operation of the schools. Even assuming a principal is entitled to *some*

degree of privacy "in the workplace," *id.*, speech by teachers on these subjects certainly does not invade a "substantial privacy interest . . . in an essentially intolerable manner." *Erznoznik* v. *City of Jacksonville,* 422 U.S. at 210. Yet this Court has held and reiterated that only a showing under this standard permits "government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it." *Cohen* v. *California,* 403 U.S. 15, 21 (1971), quoted in *Erznoznik* v. *City of Jacksonville,* 422 U.S. at 209-10. As this Court stressed in *Pickering* and *City of Madison,* it would be "intolerable" and would impair the proper functioning of the schools if teachers, "who are most likely to have informed and definite opinions" on the operations of the schools, lost their First Amendment right to communicate these opinions directly to their principal because of an inappropriate concern for the principal's privacy. Such a loss of constitutional protection for teachers would also render it difficult, if not impossible, for a principal properly to perform his own professional responsibilities. *See especially City of Madison* v. *Wisconsin Employment Relations Commission,* 429 U.S. at 177. Any legitimate protection of privacy could be accomplished through reasonable time, place, and manner regulations which would allow internal communication within fair limitations. *See Erznoznik* v. *City of Jacksonville,* 422 U.S. at 209; *Grayned* v. *City of Rockford,* 408 U.S. 104 (1972).

CONCLUSION

For the reasons expressed in this brief, *amicus curiae* respectfully urges that the judgment of the Fifth Circuit panel be reversed.

Respectfully submitted,

DAVID M. RABBAN
American Association of
University Professors
One Dupont Circle, N.W.
Washington, D.C. 20036

WILLIAM VAN ALSTYNE
Duke University
School of Law
Durham, North Carolina 27706

Attorneys for Amicus Curiae